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Nos. 16,113 and 16,114
United States Court of Appeals
For the Ninth Circuit

ANDREW J. LEONARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,

United States Attorney,

Anchorage, Alaska,

Attorney for Appellee.

FILED

DEC 10 1959

PAUL P. O'BRIEN, CLERK

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Nos. 16,113 and 16,114

**United States Court of Appeals
For the Ninth Circuit**

ANDREW J. LEONARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court for the
District of Alaska, Third Division.**

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted after trial by jury in the District Court for the District of Alaska, Third Judicial Division at Anchorage, Alaska. Jurisdiction below was conferred by 48 USC 101. Jurisdiction in this court is conferred by 28 USC 1291.

STATEMENT OF CASE.

This is a consolidated brief for the appellee in two appeals involving the same appellant, Andrew J. Leonard, both involving criminal proceedings against

appellant in what was then the District Court for the Territory of Alaska.

The first of these appeals is designated as appeal No. 16113 in this court (No. 3767 Criminal in the court below). Reference to the transcript of proceedings in this case will be made thus, (TR 13 p. 1).

The second of these cases is designated as appeal No. 16114 in this court (No. 3778 Criminal in the court below). Reference to the transcript of proceedings in this case will be made thus, (TR 14 p. 1).

No. 16113 involves a criminal proceeding based upon an indictment containing seven counts alleging violations of territorial law and one count alleging violation of a federal statute.

Count I, alleges violation of
Section 65-5-35 ACLA 1949
Breaking and Entering

Counts II, III, VI and VII, allege violation of
Section 65-6-1 ACLA 1949
Uttering and Publishing a forged instrument

Count V, alleges violation of
Section 65-5-42 ACLA 1949
Larceny in a building not a dwelling

Count IV, alleges violation of
Title 48 USC 199 (j)

Falsely securing a fishing license

Count IV was ordered dismissed by the trial court (TR 13 p. 211).

To these counts of the indictment the appellant pleaded Not Guilty, transcript of record No. 16113 p. 7, and defense counsel was appointed for him by the court.

He was tried before the District Court for the Territory of Alaska and a jury found him guilty of all counts except Count IV. From this judgment appellant appeals.

No. 16114 involves a criminal proceeding based upon an indictment containing a single count alleging a violation of Federal Statute 18 USC 2314, transportation of a forged instrument in interstate commerce, transcript of record No. 16114, pp. 1 and 2. The procedures followed in this case were the same as in No. 16113 except that the appellant was represented by a different defense counsel, also appointed by the court.

STATEMENT OF FACTS.

On June 16, 1957, the office of the William A. Smith Contracting Company was broken into (TR 13 p. 58) and eighty-five (85) payroll checks were taken (TR 13 p. 59). Some of the stolen checks were given to Joshua Davis by appellant (TR 13 p. 85). Later appellant admitted to Joshua Davis that he had committed the breaking and entering committing the burglary and had thus obtained the William A. Smith Contracting Company checks (TR 13 p. 88).

These checks soon began to appear in commerce in the City of Anchorage (TR 13 p. 81). The checks, when they appeared, had been forged (TR 13 p. 61). Ap-

pellant had been employed for a short time by the William A. Smith Contracting Company just prior to the burglary (TR 13 p. 62).

On May 11, 1957, appellant worked for a while at the Alaska Housing Authority (TR 13 p. 18). On that occasion he was left alone in the room next to the supply room (TR 13 p. 20). Shortly thereafter an inventory revealed that twenty-five (25) to thirty (30) Alaska Housing Authority checks were missing (TR 13 p. 28). One of the missing checks was cashed by the appellant (TR 13 pp. 51 and 52) and the appellant was positively identified.

The appellant had a long list of convictions for similar offenses (TR 13 p. 288).

A complaint issued on June 26, 1957, in which the appellant was charged with violation of 65-6-1 ACLA 1949, forgery and uttering a forged instrument. Appellant was arrested, arraigned before the Deputy United States Commissioner, Warren Colver, and advised of his rights on June 27, 1957, and bail was set in the sum of \$5000.00 (TR 13 p. 102 and TR 13 p. 119). Appellant made the bond on June 29, 1957 (TR 13 p. 218). After making the bond, appellant went to Fairbanks, Alaska. On June 13, 1957, his bondsman got off his bond and he was again taken into custody at Fairbanks (TR 13 p. 177). He was returned to Anchorage, Alaska, on July 16, 1957 (TR 13 p. 220).

On July 17, 1957, appellant, who was then confined in federal jail, caused a call to be placed to David Carpenter, the Treasury Agent, and in response to

this call, David Carpenter went over to the federal jail and saw the appellant who advised that he wanted to make a statement about some bank money orders. Pursuant to the appellant's request, Dave Carpenter informed agent, A. B. Clark of the Federal Bureau of Investigation on July 17, 1957 (TR 13 p. 178).

On July 18, 1957, appellant sent word to the Anchorage City Police that he wanted to get everything cleared up and give a statement relative to his activities (TR 13 p. 202). In response to this request, Detective Irmer of the Anchorage City Police, went to the Marshal's office and Deputy Marshal Johnson brought the appellant to the Marshal's office where, after again being advised of his rights, appellant voluntarily gave a confession to detective Irmer (TR 13 pp. 203-204). This is corroborated by the testimony of Deputy Marshal Johnson who was present at the time the confession was taken (TR 13 p. 124).

Agent Carpenter next received a call from the appellant and went to see him in federal jail on July 23, 1957, at which time appellant asked if his bond could not be reduced (TR 13 p. 179), at which time they agreed that the appellant would assist in some narcotic cases and Agent Carpenter addressed a request to the United States Attorney on August 2, 1957, to reduce the bail and bail was subsequently reduced.

The statement of facts in Case No. 16114 must of necessity be almost the same as in case No. 16113. The

main difference being in the offense charged and the agency to whom the appellant made his voluntary confession.

Here again the appellant secured employment with a janitorial service, this was the Clean Rite Janitorial Service (TR 13 pp. 6-8), who had a contract to clean the Tucker-Peterson Building which was occupied by Morrison-Knudsen Company (R 14 p. 7).

Shortly thereafter a Morrison-Knudsen check was cashed at the Sportland Amusement Company (R 16 p. 48). This was a Morrison-Knudsen check written against their account on the Seattle First National Bank at Seattle, Washington, in the sum of Two Hundred Eighty Five Dollars and one cent (\$285.01) payable to the order of Joe Hill and bearing what purported to be the signature of Terrance McMullen (R 14 p. 27). This check was deposited in the First National Bank at Anchorage by the Sportland Amusement Company (TR 14 pp. 53-55). The check was then sent through the mail in interstate commerce to the Seattle First National Bank in Seattle, Washington, for collection (R. 14 pp. 68 through 87). This check had been partially prepared and before being signed an error had been noted and the check voided by cutting out the space for the signature (R 14 pp. 13 through 37). The appellant picked up this voided check, filled in the name of Joe Hill as payee, cut the signature from another voided check, pasted it in the space where the signature had been cut out and took it to the basement of the bus station and cashed it (R 14 pp. 151-152).

The appellant had been arrested on June 26, 1957, and charged with violation of 65-6-1 ACLA 1949, forgery and uttering a forged instrument, was arraigned by the Deputy United States Commissioner, Warren Colver on June 27, 1957, and bail set at \$5000.00 (R. 13 p. 102 and p. 119). Appellant made the bond on June 29, 1957 (R 13 p. 218). After making the bond the appellant went to Fairbanks, Alaska. On June 13, 1957, his bondsman got off his bond and he was again taken into custody at Fairbanks (R 13 p. 177). He was returned to Anchorage on July 16, 1957 (R 13 p. 220).

On July 17, 1957, appellant placed a call to Treasury Agent Carpenter, and in response to this call Carpenter went over to the federal jail and saw the appellant who advised that he wanted to make a statement about some bank money orders. Pursuant to the appellant's request, Agent A. B. Clark of the Federal Bureau of Investigation was informed on July 17, 1957 (R 13 p. 178). Agent A. B. Clark, in company with Treasury Agent Carpenter, interviewed appellant on July 17, 1957, in the Marshal's office at Anchorage, Alaska, and the agent A. B. Clark after again advising the appellant of his rights, obtained a voluntary statement of the appellant (R 14 p. 92 and p. 133). Treasury Agent Carpenter next received a call from appellant and went to see him in the federal jail on July 23, 1957, at which time appellant asked if his bond could not be reduced (R 13, p. 179), at which time they agreed that appellant would assist Treasury Agent Carpenter in some narcotic cases and Agent

Carpenter addressed a request to the United States Attorney to reduce the bail on August 2, 1957, and bail was subsequently reduced (R 13 p. 180).

ARGUMENT.

- I. **THE TRIAL COURT DID NOT ERR IN CASE NO. 16113 IN ADMITTING INTO EVIDENCE THE VOLUNTARY CONFESSION OF THE APPELLANT. THERE WAS AMPLE COMPETENT EVIDENCE WITHOUT THE CONFESSION TO LINK THE APPELLANT WITH THE CRIMES ALLEGED IN THE INDICTMENT.**

The record is replete with evidence to demonstrate that the confession was voluntary. It was testified by the Criminal Clerk in the United States Commissioner's Court, Lois Bradley, that her records revealed the appellant had been arraigned and advised of his rights on June 27, 1957 (R 13 p. 102). This is corroborated by the testimony of Warren Colver, the Deputy United States Commissioner who arraigned the appellant (R 13 p. 119). Appellant was further warned by detective Irmer (R 13 p. 204) which is corroborated by the testimony of Deputy Marshal Johnson (R 13 p. 192). As a matter of fact the appellant admitted he had even consulted with his own attorney (R 13 p. 217). The confession was not obtained until July 18, 1957, almost a month later (R 13 p. 207). Appellant's counsel would make much out of the lowering of the bail in their argument and although the bail was subsequently reduced so appellant could act as an informer for the police, in regard to narcotic violations, this was not even dis-

cussed with appellant until July 23, 1957, some five days after the confession was obtained (R 13, p. 180).

In federal courts there is no presumption against the voluntary character of a confession and the burden is not on the Government in the first instance to show its voluntary character; *Rhodes v. U.S.*, 224 F. 2d 348 (5th Cir. 1955). A confession is presumed to be voluntary; *Gray v. U.S.*, 9 F. 2d 337 (9th Cir. 1926).

Admissions or confessions of defendants in criminal cases, even after arrest, if voluntarily made are admissible in evidence. *Symons v. U.S.*, 178 F. 2d 615 (9th Cir. 1949), cert. denied 339 U.S. 985; *Fowler v. U.S.*, 239 F. 2d 93 (10th Cir. 1956).

Appellant in this portion of his argument (Brief p. 24) alleges there is a scarcity of corroborative proof as regards the confession. The true rule is all that is necessary is that the corroborative evidence must, of itself, tend to show appellant guilty as charged. *Wynkoop v. U.S.*, 22 F. 2d 799 (9th Cir. 1927); *Wiggins v. U.S.*, 64 F. 2d 950 (9th Cir. 1933).

Witness Harrison positively placed the appellant in the Alaska Housing Authority at the time of the crime at the place from which the checks were missing and that he was alone (R 13 p. 20). He was later identified by Dexter Holst as having cashed one of the stolen Alaska Housing Authority checks in the Spensard Cocktail Lounge (R 13 p. 52).

C. C. Stanley placed appellant at the William A. Smith Contracting Company for a period of three

days right before their firm was burglarized and the checks were taken (R 13 p. 62). Joshua Davis testified that appellant gave him four of the William A. Smith Contracting Company checks that had been stolen (R 13 p. 85), and that appellant admitted to Joshua Davis that he broke into the William A. Smith Contracting Company (R 13 p. 88). An examination of the records not only refutes the contention of appellant's counsel as to the scarcity of the corroboration but discloses corroboration so strong and so persuasive as to warrant conviction without the use of the confession.

II. IN CASE NO. 16113 THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S REQUESTED INSTRUCTION TO THE JURY WITH RESPECT TO THE VOLUNTARINESS OF THE CONFESSION BUT INSTEAD GAVE INSTRUCTION 15 WHICH WAS A PROPER INSTRUCTION ON THE FACTS.

On page 26 of appellant's brief, appellant complains of instruction 15 as given by the trial court and of the trial court's failure to give the instruction proposed by the appellant. Instruction 15 is found in its entirety on pages 21 and 22 of the Transcript of Record in case No. 16113. The instruction proposed by the appellant is found in its entirety on pages 32 and 33 of the Transcript of Record in case No. 16113. Objection was made to Instruction 15 as given by the trial court but no grounds were given for the objection, except that the court failed to give the proposed instruction presented by the appellant. Certainly the appellant did not comply with Rule 30 of the Federal Rules of Criminal Procedure by "stating

distinctly the matter to which he objects and the grounds for his objection," but if it is the pleasure of this court to consider this specification of error in spite of the non-compliance with rule 30 of Federal Rules of Criminal Procedure, it will be noted that every element contained in the proposed instruction will be found in Instruction 15 as given and as a matter of fact Instruction 15 is more susceptible of easy understanding by a lay jury, than is the proposed instruction and the appellant could not possibly have been prejudiced.

III. IN CASE NO. 16113 THE TRIAL COURT DID NOT ERR AND DID NOT ADMIT IN EVIDENCE, EVIDENCE OBTAINED DIRECTLY OR INDIRECTLY THROUGH AN UNLAWFUL SEARCH AND SEIZURE.

The appellant talks in general terms about prejudice because the police saw he had a fishing license in his possession made out in the name of Don Woods, which he admitted in his signed confession was obtained by giving the licensing people false information as to his identity (R 13 p. 208). It does not appear at any place in the record that the appellant objected to the police looking at the fishing license. It further appears that the license was never offered in evidence and that the papers dealing with the application for the license were excluded from evidence (R 13 p. 99) and as a matter of fact Count IV of the Indictment, the fishing license count, was dismissed by the trial court (R 13 p. 211). Nowhere in the record is there any indication, except in the argument of counsel, that there is or was any connection between the fishing li-

cense and the other vast array of evidence accumulated against the appellant. The police had knowledge of his presence in the community and of his presence at both the Alaska Housing Authority and the William A. Smith Contracting Company, just prior to the time the checks were taken. They were aware of his previous convictions for similar offenses so it is respectfully submitted that the Don Woods fishing license incident did not prejudice the appellant in any way.

The true rule is where the connection between the evidence sought to be introduced and the previous misconduct of the police is so attenuated as to dissipate the taint, the evidence should not be excluded, *Gregory v. U.S.*, 231 F. 2d 258 (Wash. D.C. Cir. 1956); *U.S. v. Place*, 263 F. 2d 627 (2nd Cir. 1959). That is certainly our case on our facts. It is respectfully submitted that there was no misconduct on the part of the police officers and if there had been misconduct, there is no connection between the Don Woods license incident and the balance of the evidence and certainly if there was previous misconduct on the part of the police it was so attenuated as to dissipate the taint.

IV. IN CASE NO. 16113 THE TRIAL COURT DID NOT ERR AND DID NOT FAIL TO PROTECT THE APPELLANT FROM INADMISSIBLE AND PREJUDICIAL TESTIMONY GIVEN BY THE COURT ATTACHE. THE TESTIMONY GIVEN BY THE COURT ATTACHE WAS PROPERLY ADMISSIBLE AND WAS NOT PREJUDICIAL.

The appellant complains that the trial court permitted a court attache to testify with respect to the

prior proceedings in the United States Commissioner's court. Lois Bradley is the party to whom the appellant refers and she was Clerk of the Criminal Records of the United States Commissioner's office and was official custodian of the records (R 13 p. 101). The subject matter to which she testified was as to the voluntary nature of the confession of the appellant which was shortly to be introduced. If the witness, Lois Bradley, had any information relative to this matter certainly she was a competent witness to testify to that information. In any event such testimony could not have prejudiced the appellant since her testimony was completely corroborated by Warren Colver, the then Deputy United States Commissioner (R 13 p. 119) and by the original of the Held to Answer papers in the trial court's file (R 13 p. 210) all of which show that the appellant was advised of his rights on June 27, 1957, by Deputy United States Commissioner Warren Colver, and the confession of the appellant was not given until July 18, 1957.

V. IN CASE NO. 16114 THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE VOLUNTARY WRITTEN CONFESSION GIVEN BY THE APPELLANT AND THERE WAS SUFFICIENT OTHER COMPETENT EVIDENCE TO FULLY CORROBORATE THE VOLUNTARY CONFESSION.

Admissions or confessions of defendants in criminal cases, even after arrest, if voluntarily made are admissible in evidence. *Symons v. U.S.*, 78 F. 2d 615 (9th Cir. 1949) cert. denied 339 U.S. 985; *Fowler v.*

U.S., 239 F. 2d 93 (10th Cir. 1956). Here the appellant had been arrested and was in custody at the time he gave the confession. He had been arrested on June 26, 1957, on case No. 16113 (R 13 p. 111) and had been taken before the Commissioner and arraigned on June 27, 1957, in accordance with Rule 5 of the Federal Rules of Criminal Procedure (R 13 p. 119).

The fact that the arraignment was on a different charge is not controlling, *U.S. v. Carignan*, 185 F. 2d 954 as modified by 342 U.S. 36 (9th Cir. 1950); *Tyler v. U.S.*, 193 F. 2d 24 (D.C. Cir. 1951).

In addition to the advice given by the Commissioner at the time of arraignment (R 13 p. 119) and being permitted to consult with his own attorney (R 13 p. 217) and having been further advised by Detective Mel Irmer (R 13 p. 204) which was corroborated by the testimony of Olaf Johnson (R 13 p. 192), he was further advised by Special Agent A. B. Clark of the Federal Bureau of Investigation (R 14 p. 92), which was corroborated by the testimony of Treasury Agent Carpenter (R 14 p. 133). After the appellant had been repeatedly advised of his rights by the Commissioner, by his own attorney, by detective Irmer and then by Agent A. B. Clark, the only conclusion that can be reached is that this was a voluntary confession.

In this portion of his argument, appellant also asserts that, but for his confession, there was no competent evidence to link the appellant with the crime. The true rule is that unless corroborated by independent evidence of the corpus delicti, the extra judicial confession or declaration of a defendant charged with

a crime are not sufficient to authorize a conviction but independent evidence need not be of itself sufficient proof of guilt but need only be a sufficient showing which *together* with defendant's confession or admission establishes the crime beyond a reasonable doubt. *Chevillard et al. v. U.S.*, 155 F. 2d 929 (9th Cir. 1946); *Evans v. U.S.*, 122 F. 2d 461 (10th Cir. 1941); *Smith v. U.S.*, 348 U.S. 147, Sup. Court 1954, viewed in the light of the true rule there was ample corroboration.

VI. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A MISTRIAL FOLLOWING THE PROSECUTING ATTORNEY'S OPENING STATEMENT AND THE INSTRUCTIONS GIVEN BY THE COURT IN REGARD THERETO WERE CLEAR AND MORE THAN ADEQUATE.

The evidence outlined by the prosecutor in his opening statement was evidence which, under the facts of this case, should have been admissible.

The chief forms of offense connected with forged and other counterfeit documents are (1) making the false article, (2) passing it knowingly with intent to utter, and (3) knowingly uttering. Here the crime charged is in the last category. In all of them the criminal intent, including knowledge and other elements will be in issue, Wigmore on Evidence, Vol. 2, Section 309, 3rd Edition.

Evidence of similar transactions should be received for the purpose of showing intent, knowledge, motive, design or scheme where such element is essential to

the commission of the offense. Wigmore on Evidence, Vol. 2, Section 312, 3rd Edition. *Ehrlich v. U.S.*, 238 F. 2d 481 (5th Cir. 1956); *Hoyer v. U.S.*, 223 F. 2d 134 (8th Cir. 1955).

In any event, the objection was not timely made. Appellant and his counsel sat quietly by until the prosecutor had completed his opening statement and then asked for a mistrial. The objection, if appellant was going to object, should have been made when the prosecutor launched into his discussion, of what appellant conceived to be objectionable material. When actually made, it was not timely made. *Langley v. U.S.*, 8 F. 2d 815 (6th Cir. 1925); *Alberty v. U.S.*, 91 F. 2d 461 (9th Cir. 1937); *Noland v. U.S.*, 10 F. 2d 768 (9th Cir. 1926). The appellant may not sit idly by and gamble with a court result and then seek to have undone what has been done. *State v. Collins*, 10 F. Supp. 1007. Here the appellant chose to gamble and having done so and lost, cannot complain.

In any event, if the conduct complained of prejudiced the appellant in any manner, the prejudice was corrected by the prompt action taken by the trial court in instructing the jury to disregard the remarks of the prosecutor, prior to any further proceedings in the case (Supp. R 14 p. 29), and his further instruction at the close of the case (R 14 p. 188).

CONCLUSION.

Based on the foregoing reasons and authorities, the judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
December 4, 1959.

Respectfully submitted,

WILLIAM T. PLUMMER,

United States Attorney,

Attorney for Appellee.



No. 16116

United States
Court of Appeals
for the Ninth Circuit

ROSE WONG and KENT WONG,
Appellants,
vs.

WALTER SWIER and LAURA SWIER,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division

FILED

DEC 3 1958

PAUL P. O'BRIEN, CLERK



No. 16116

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Southern Division



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Zimmerman, Dr. James E.

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Bounds, Robert I.

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Brazil, C. A.

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Clark, Cecil C.

—direct (Splawn)	198
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—redirect (Splawn)	228
—recross (Splawn)	233

Hovde, Ben

—direct (Splawn)	243
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Witnesses for Defendants—(Continued):

Moritz, Louis C.

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Rossow, Herbert

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Swier, David

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—redirect (Splawn)	305
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Swier, Laura

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Swier, Walter

—direct (Splawn)	197
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NAMES AND ADDRESSES OF ATTORNEYS

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In The United States District Court for
Eastern District of Washington

Civil Action No. 1137

ROSE WONG,

Plaintiff,

vs.

WALTER SWIER, LAURA SWIER, DR. JAMES
E. ZIMMERMAN, DR. LELAND R. LUGAR,
and YAKIMA VALLEY MEMORIAL HOS-
PITAL ASSOCIATION, Defendants.

COMPLAINT

(Damages)

Plaintiff complains of defendants and alleges:

1. Plaintiff is a citizen of the State of Idaho and the defendants are residents of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. That on or about the 17th day of October, A.D., 1955, the plaintiff was employed by the defendants Walter Swier and Laura Swier as an apple picker in the said defendants' orchards in Cowiche, Washington, and that on the said date of October 17, 1955, it became the duty of plaintiff in the course of her said employment to go upon, and she did go upon, a ladder furnished to her by the said defendants Walter Swier and Laura Swier.

3. That it was the duty of said defendants Wal-

ter Swier and Laura Swier to furnish to plaintiff a safe and secure ladder for the performance of her said work, but that the said defendants on the contrary carelessly and negligently furnished to plaintiff an unsafe, defective and dangerous ladder, of which fact the plaintiff was ignorant.

4. That the said defendants failed to warn the plaintiff of the unsafe, defective and dangerous condition of said ladder, and that solely by reason of the dangerous and defective condition thereof, the ladder tipped and fell while plaintiff was upon the same in the performance of her said duties on the 17th day of October, 1955, and the plaintiff was precipitated to the ground, and sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula and was otherwise injured.

5. That following the fall from the ladder and on the same day, to-wit October 17, 1955, the plaintiff was taken by ambulance to the Yakima Valley Memorial Hospital, Yakima, Washington, an institution operated by the defendant Yakima Valley Memorial Hospital Association, and was admitted to said hospital as a patient.

6. That Dr. James E. Zimmerman, a physician admitted to practice in the State of Washington, was called and employed to examine such broken ankle and ascertain the extent of the injury and to set and treat the same; and that the defendant Dr. James E. Zimmerman called in Dr. Leland R. Lugar, an orthopedic specialist, admitted to

practice in the State of Washington, and the said defendants, Dr. James E. Zimmerman and Dr. Leland R. Lugar, did enter upon the treatment and healing of said injury.

7. That the defendants, Dr. James E. Zimmerman and Dr. Leland R. Lugar, did not use due and proper care and skill in the care and treatment of plaintiff.

8. That the agents, servants and employees of the defendant Yakima Valley Memorial Hospital Association carelessly, negligently and unskillfully cared for and treated the plaintiff and failed to use due and proper care and skill in the treatment and care of the plaintiff.

9. That as a result of the carelessness and negligence of the defendants and each of them, and of the negligence of the defendants Dr. James E. Zimmerman, Dr. Leland R. Lugar, Yakima Valley Memorial Hospital Association and of the unskillful manner in which said latter three named defendants, and each of them, treated and cared for plaintiff, gas gangrene infection set in.

10. That as a result of the negligence of the defendants and each of them, plaintiff has sustained permanent injuries; a shortening of the left leg; permanent and severe scarring; has been prevented from following any occupation and will continue to be so prevented; has been prevented from caring for her family; has suffered great pain of body and mind; has incurred expenses for medical attention and hospitalization and will continue to incur

expenses therefor; has incurred expenses for orthopedic appliances and will continue to incur such expenses, all to her damage in the sum of One Hundred Thousand and no/100 Dollars.

Wherefore, plaintiff prays judgment against the defendants and each of them in the sum of \$100,000.00; interest from the commencement of this action; all costs of court and general relief.

DEAN W. MULLIN,
/s/ ALICE LOVELAND,
Attorneys for Plaintiff.

[Endorsed]: Filed August 29, 1956.

[Title of District Court and Cause.]

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Defendants Walter Swier and Laura Swier move for an order making more definite and certain paragraph 3 of plaintiff's complaint, i.e., that part of such paragraph reading as follows: "but that the said defendants, on the contrary, carelessly and negligently furnished to plaintiff an unsafe, defective and dangerous ladder, of which fact the plaintiff was ignorant."

This motion is to cause plaintiff to set forth specifically the ground or grounds of such alleged carelessness and negligence, and further to set forth the respect or respects it is alleged that the alleged ladder was unsafe, defective and danger-

ous, and this motion is directed not only to said paragraph 3, but also to paragraphs 4, 9, and 10, of said complaint, as such further paragraphs also refer to alleged unsafe, defective and dangerous condition of said ladder and alleged carelessness and negligence in general and conclusionary terms.

/s/ HOMER B. SPLAWN,

Attorney for Defendants Walter
Swier and Laura Swier.

[Endorsed]: Filed January 22, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS SWIER

Defendants Swier answer plaintiff's complaint as follows:

I.

In respect of paragraph 1. thereof, these defendants acknowledge the same except the allegation as to plaintiff's citizenship and residence and the allegation with respect to the residence of defendant Lugar, which latter allegations are denied.

II.

In respect of paragraph 2. thereof, these defendants acknowledge that plaintiff was an employee of theirs on October 17, 1955, as an apple picker in their orchard at Cowiche, and that as such employee she used a ladder furnished by these defendants, and these defendants deny any other inference from such paragraph.

III.

In respect of paragraph 3. thereof, these defendants acknowledge that plaintiff was entitled to be furnished a reasonably safe ladder, but deny all the rest of such paragraph.

IV.

In respect of paragraph 4. thereof, these defendants deny the same, except that plaintiff received an injury, the exact nature and extent thereof being unknown to these defendants, so that part of such paragraph is denied upon the lack of sufficient independent knowledge to form a positive belief thereto, and these defendants state that there was no necessity for giving plaintiff any warning with respect to the ladder used by plaintiff.

V.

In respect of paragraph 5. thereof, these defendants acknowledge the same.

VI.

In respect of paragraph 6. thereof, these defendants acknowledge that Dr. James E. Zimmerman was called to examine plaintiff and treat her, and that he is a duly licensed physician, but in respect of the balance of such paragraph, these defendants stated that they do not have sufficient independent knowledge concerning the same as to form a positive belief thereto and so deny the rest of such paragraph upon such lack of sufficient independent knowledge on their part.

VII.

In respect of paragraph 7. thereof, these defendants state that they are not qualified and do not have sufficient independent knowledge to form a positive belief concerning such paragraph and so deny the same upon such lack of sufficient independent knowledge on their part.

VIII.

In respect of paragraph 8. thereof, these defendants make the same answer as to paragraph 7. thereof.

IX.

In respect of paragraph 9. thereof, these defendants deny any negligence on their part, or either of them, in any respect, and as to the balance of such paragraph, they state that they do not have sufficient independent knowledge concerning the same as to form a positive belief thereto and so deny the balance of such paragraph upon such lack of sufficient independent knowledge on their part.

Further answering plaintiff's complaint and as affirmative defenses thereto, these defendants state that, if plaintiff were injured because of any alleged condition of the ladder, such injury was proximately brought about and contributed to by her own negligence; that there was no defect in the ladder which had anything to do with any accident which befell plaintiff; and that whatever conditions existed in respect of the ladder and the use thereof were assumed by plaintiff and the risk thereof, if there were any risk attached thereto.

Wherefore, having fully answered plaintiff's complaint, these defendants ask that the same be dismissed.

/s/ HOMER B. SPLAWN,
Attorney for Defendants.

Duly Verified.

[Endorsed]: Filed March 25, 1957.

[Title of District Court and Cause.]

MOTION TO ADD PARTY PLAINTIFF

Come now Rose Wong, plaintiff, by her attorneys, and Kent Wong, and move this Honorable Court for an order adding the name of Kent Wong as a party plaintiff in this action; and

As Grounds For This Motion state unto the Court as follows:

That Kent Wong is the husband of Rose Wong and may have some interest in this action; that it is the desire of the plaintiff that he be made a party plaintiff herein; and that it is the desire of said Kent Wong to become voluntarily a party plaintiff in this said action in order that complete relief may be afforded herein.

/s/ ALICE LOVELAND,
/s/ GEORGE H. MULLINS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 30, 1957.

[Title of District Court and Cause.]

ORDER

This Matter coming on to be heard upon Motion to Add Party Plaintiff, and the court having read said Motion, no objection being made and being now sufficiently advised in the premises, Doth Find:

That it would be proper to join and add as a party plaintiff herein Kent Wong, who is the husband of Rose Wong.

It Is, Therefore, Ordered, that Kent Wong be and hereby is joined and added as a party plaintiff herein.

Done In Open Court this 6th day of June, 1957.

By The Court:

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ GEORGE H. MULLINS,
Of Counsel for Plaintiff.

Approved as to form:

/s/ JOHN GAVIN,
Of Counsel for Defendant
Hospital.

Approved as to form:

/s/ HOMER B. SPLAWN,
Counsel for Defendant Swier.

[Endorsed]: Filed June 6, 1957.

In The United States District Court, Eastern
District of Washington, Southern Division

No. 1137

ROSE WONG,

Plaintiff,

vs.

WALTER SWIER, LAURA SWIER, DR. JAMES
E. ZIMMERMAN, DR. LELAND LUGAR
and YAKIMA VALLEY MEMORIAL HOS-
PITAL ASSOCIATION, Defendants,

KENT WONG,

Additional Plaintiff.

REQUEST AND MOTION BY DEFENDANTS
SWIER FOR JURY TRIAL

Defendants Swier respectfully request and move
for jury trial of all issues of fact herein.

This request and motion is based upon the files
and records herein, including the Answer of De-
fendants Swier With Respect to Additional Party
Plaintiff, and following affidavit.

/s/ HOMER B. SPLAWN,

Attorney for Said Defendants.

State of Washington,
County of Yakima—ss.

Homer B. Splawn, being sworn, on oath says:
He is said defendants' attorney herein; an addi-
tional party plaintiff was added herein on June
6, 1957; on June 7, 1957, said defendants made an-

swer to said additional party plaintiff and stated a counterclaim against him, all as appears from said Answer of Defendants Swier With Respect to Additional Party Plaintiff, filed herein on June 10, 1957; assignment for jury trial will not delay this case being tried; and it is a proper case for jury trial.

/s/ HOMER B. SPLAWN,

Subscribed and sworn to before me this 7th day of June, 1957.

[Seal] /s/ LORETTA RUDICK,
Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

APPLICATION FOR LEAVE TO AMEND ANSWER OF DEFENDANTS SWIER TO COMPLAINT OF ROSE WONG

Application is hereby made to the court for leave to amend the answer of defendants Swier (heretofore filed and served herein) to the complaint of Rose Wong, by the addition of a paragraph to be numbered "X", to follow paragraph "IX" of such answer and to read:

"In respect of paragraph 10 of said complaint these defendants deny any negligence on their part, or either of them, and deny the balance of such paragraph, the denial as to the

alleged medical and hospital matters being upon the lack of sufficient independent knowledge as to form a positive belief as to such alleged matters.”

Attached hereto is a copy of said answer as so amended.

Dated June 7, 1957.

/s/ HOMER B. SPLAWN,

Attorney for Said Defendants.

State of Washington,
County of Yakima—ss.

Homer B. Splawn, being sworn, on oath says: He is said defendants' attorney herein; until today he had inadvertently overlooked the fact that paragraph 10 of the complaint of Rose Wong was inadvertently not answered; so leave is respectfully asked of the court to add the above paragraph to the answer of said defendants to said complaint.

/s/ HOMER B. SPLAWN.

Subscribed and sworn to before me this 7th day of June, 1957.

[Seal] /s/ LORETTA RUDICK,

Notary Public in and for the State of Washington,
residing at Yakima.

[Note: Amended Answer is the same as set out at pages 7-10 except for the amendment stated above.]

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS SWIER WITH
RESPECT TO ADDITIONAL PARTY
PLAINTIFF

An additional plaintiff having been added herein, viz., Kent Wong, on June 6, 1957, defendants Swier answer him as follows:

1.

They deny any diversity of citizenship or residence on his part.

2.

They acknowledge that Rose Wong was an employee of theirs on October 17, 1955, as an apple picker in their orchard at Cowiche, and that as such employee she used a ladder furnished by these defendants, and these defendants deny any other inference contained in paragraph 2. of her complaint.

3.

These defendants acknowledge that Rose Wong was entitled to be furnished a reasonably safe ladder, but deny the rest of paragraph 3 of her complaint.

4.

These defendants deny paragraph 4 of her complaint except that she received an injury, the exact nature and extent thereof being unknown to these defendants, so that part of such paragraph is denied upon the lack of sufficient independent knowledge, and these defendants state that there was no necessity for giving her any warning with respect

to the ladder used by her and that, if there were any duty to give her any warning because of any asserted defect (denying that there was any), the same devolved upon said additional plaintiff, as hereinafter alleged.

5.

These defendants acknowledge paragraph 5 of Rose Wong's complaint.

6.

These defendants acknowledge that Dr. James E. Zimmerman was called to examine Rose Wong and treat her and that he is a duly licensed physician, but the balance of paragraph 6 of her complaint is denied upon the lack of sufficient independent knowledge concerning the same as to form a positive belief.

7.

As to paragraphs 7 and 8 of her complaint, these defendants state that they do not have sufficient independent knowledge about the same as to form a positive belief and so deny the same.

8.

As to paragraph 9 thereof, these defendants deny any negligence on their part, or either of them, in any respect, and deny the balance of such paragraph upon the lack of sufficient independent knowledge to form a positive belief.

9.

As to paragraph 10, thereof, these defendants deny, as stated above, any negligence on their part, or either of them, and deny the balance of such

paragraph, the denial as to the alleged medical and hospital matters being upon the lack of sufficient independent and accurate or exact knowledge as to form a positive belief as to such alleged matters.

Further answering, these defendants state that, if Rose Wong were injured because of any asserted condition of the ladder, such injury was proximately brought about and contributed to by her own negligence, as specifically stated in open court; that there was no defect in the ladder which had anything to do with any accident which befell her; and that whatever conditions existed in respect of the ladder and the use thereof were assumed by her and the risk thereof, if there were any risk attached thereto.

Further answering said additional plaintiff, these defendants state that, if there were any defective condition or conditions in the ladder amounting to negligence as claimed by plaintiff Rose Wong (these defendants denying any negligence on their part), then he, the said Kent Wong, became responsible therefor for the reason that, when the ladders were furnished to the Wong family at the beginning, it was requested verbally that he report any defect in their ladders that might arise and become noticeable in their use of the same, to which he assented verbally as a part of his employment with these defendants, so that, if such a defect arose and was serious enough to amount to negligence, then he breached his contract of employment and cannot recover, nor can plaintiff Rose Wong likewise, as

he failed to report any defect, let alone any defective condition rendering the ladder unsafe for ordinary use in an orchard and, had there been any such defective condition arise and been reported, the same would have been thereupon remedied, and the injury of plaintiff Rose Wong, if due to anyone's failure in respect of asserted condition or conditions of the ladder, if any, was due to the said Kent Wong's failure as above alleged, and these defendants repeat that actually there was no negligent condition of the ladder and no condition of the same which had anything to do with the accident.

Further answering and as a counterclaim against said additional plaintiff, these defendants allege:

1.

One, Kent Wong, became a party plaintiff in this action on June 6, 1957. He is the husband of Rose Wong, the other plaintiff.

2.

Rose Wong is seeking to recover damages from these defendants for allegedly having furnished her an allegedly unsafe ladder, alleging that the ladder thus fell, precipitating her to the ground and injuring her, all as set out in her pleadings herein.

3.

If there were any defective condition or conditions in the ladder amounting to negligence as claimed by plaintiff Rose Wong (these defendants

denying any negligence on their part), then he, the said Kent Wong, became responsible therefor for the reason that, when the ladders were furnished to them in the beginning, it was requested verbally that he report any defect therein that might arise and become noticeable in their use of the same, to which he assented verbally as a part of his employment with these defendants.

4.

If such a defect arose and was serious enough to amount to negligence, then he breached his contract of employment and cannot recover, nor can plaintiff Rose Wong likewise, since he failed to report any defect, let alone any defective condition rendering the ladder unsafe for ordinary use in the orchard and, had there been any such defective condition arise and been reported, the same would have been thereupon remedied.

5.

The injury to plaintiff Rose Wong, if due to anyone's failure in respect of asserted condition or conditions of the ladder, if any, was due to the said Kent Wong's failure as above alleged, as there could have been no other such condition or conditions occur than as mentioned in paragraph 3.

6.

Said additional plaintiff, therefore, is liable to these defendants for any claim or loss, if there is any, herein.

Wherefore, these defendants ask that plaintiff Rose Wong and the additional plaintiff, Kent Wong, take no verdict or judgment herein against these defendants; that in case of a verdict or judgment these defendants have one for like amount against them; and for such other relief as is called for in the premises.

/s/ HOMER B. SPLAWN,
Attorney for Said Defendants.

Duly Verified.

[Endorsed]: Filed June 10, 1957.

[Title of District Court and Cause.]

**OBJECTION TO REQUEST OF MOTION FOR
JURY TRIAL BY DEFENDANTS SWIER**

Comes Now the plaintiff, by her attorneys, and hereby objects to the granting of defendants Swier's request and motion for jury trial; and,

As Grounds For This Motion states unto the court that said request and motion is not timely and is not in accordance with the provisions of the Federal Rules of Civil Procedure, to-wit: Rule 38B.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
/s/ GEORGE H. MULLINS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 17, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

As the result of a pre-trial conference heretofore had on the 6th day of June, A.D. 1957, in the United States Courthouse, Yakima, Washington, whereat the Honorable Sam M. Driver presided, the plaintiffs were represented by Thomas K. Hudson and Alice Loveland, and the defendants Walter Swier and Laura Swier were represented by Homer B. Splawn, and the defendant Dr. James E. Zimmerman was represented by Robert R. Redman and John S. Moore, and the defendant Yakima Valley Memorial Hospital Association was represented by Robert R. Redman and George Martin, attorneys of record, the following issues of fact and law were framed and exhibits identified.

Nature of Proceedings

This is an action for damages brought by the plaintiffs against the defendants for injuries sustained by the plaintiff Rose Wong and alleged to have been proximately caused by the negligence of the defendants.

Admitted Facts

The following facts have been agreed upon by the parties and require no proof:

1. That all defendants are residents of the State of Washington; that plaintiffs are residents and citizens of the State of Idaho; and that this Court has jurisdiction herein.

2. That the plaintiff Rose Wong was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and that as such employee she used a ladder furnished by these defendants, and that said defendants Walter Swier and Laura Swier were under a duty to furnish said plaintiff a safe ladder.

3. That the plaintiff Rose Wong sustained injuries by reason of a fall from said ladder in the course of her employment.

4. That the defendant Dr. James E. Zimmerman was contacted with reference to the treatment and care of said plaintiff.

5. That said plaintiff was taken to and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington, operated by defendant Yakima Valley Memorial Hospital Association.

6. That while the plaintiff Rose Wong was a patient in said hospital gas gangrene developed.

7. That the medical bill of Dr. James E. Zimmerman for treating Rose Wong is unpaid, and that said bill was not rendered until June 19, 1957; and that the hospital bill rendered to her by the Yakima Valley Memorial Hospital is unpaid.

Plaintiffs' Contentions

Plaintiffs' contentions are as follows:

1. That the ladder furnished to the plaintiff Rose Wong by the defendants Walter Swier and Laura Swier was an unsafe, defective and danger-

ous ladder, of which fact the plaintiff was ignorant, and that the defendants Walter Swier and Laura Swier failed to warn the plaintiff of the unsafe, defective and dangerous condition of said ladder, which unsafe, defective and dangerous condition of said ladder was known or should have been known by the defendants Walter Swier and Laura Swier; that such defective and unsafe condition included but was not limited to the following defects:

(a) That the metal plate and bolt assembly at the top of the ladder was defective.

(b) That the tongue of the ladder was defective.

(c) Any other way in which said two situations could be described.

(d) Other defects latent or patent.

2. That plaintiff's fall was proximately caused by the defective condition of the ladder; that by reason of the fall from the ladder plaintiff sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula, and was otherwise injured.

3. That following the fall from the ladder and on the same day, to-wit, October 17, 1955, plaintiff Rose Wong was taken by ambulance to the Yakima Valley Memorial Hospital in Yakima, Washington, and was admitted to said hospital as a patient of Dr. James E. Zimmerman.

4. That Dr. James E. Zimmerman, a physician admitted to practice in the State of Washington, was called and entered upon the care and treatment of said plaintiff.

5. That the fall and resulting injury occurred at approximately 10:30 o'clock in the A.M. on October 17, 1955, and that the fracture was reduced and a short cast applied at approximately 1:00 o'clock P.M. on the same day at the Yakima Valley Memorial Hospital; that at said time no tetanus or gas gangrene antitoxin shots were administered to the plaintiff, and that the defendant Dr. James E. Zimmerman failed to use methods recognized and approved by those reasonably skilled in that profession in said community and failed to administer the customary and recognized drugs to prevent gangrene and infection, and that plaintiff Rose Wong developed gas gangrene; that said condition was obvious and was ignored by the defendants Dr. James E. Zimmerman and Yakima Valley Memorial Hospital after such infection and condition was obvious and after being advised thereof; and that no antitoxin for infection or gangrene or gas gangrene was administered to plaintiff until a week after the setting of the fracture and until after infection had set in and was obvious, and that the defendant Dr. James E. Zimmerman failed to give proper medical attention to the said plaintiff.

6. That as a proximate result of the negligence of the defendants and each of them, plaintiff has sustained temporary and permanent injuries and disabilities consisting of a shortening of the left leg, permanent and severe scarring, permanent, constant and continual pain; has been and will con-

tinue to be prevented from following any occupation and from caring for her family, and has suffered and will continue to suffer great pain of body and mind.

7. That said plaintiffs have incurred expenses for medical attention in the sum of \$1,135.00, have incurred expenses for hospitalization in the sum of \$1,842.57, have incurred expenses for drugs in the sum of \$360.00, have incurred expenses for orthopedic appliances in the sum of \$55.00.

8. That the special damages proximately resulting from the negligence of the defendants and each of them are in the sum of \$3,392.57, and that the general damage proximately resulting therefrom is in the sum of \$97,600.00.

9. That plaintiffs will continue to incur expenses for medical attention, hospitalization, drugs and orthopedic appliances.

Contentions of Defendants Walter Swier
and Laura Swier

In addition to the facts admitted as hereinabove outlined, these defendants contend:

That the plaintiff Rose Wong assumed whatever risks were entailed in the condition of the ladder or the use made of it or expected of it.

They further contend that said plaintiff in the use of the ladder was negligent in that she endeavored to use the ladder while she herself got into an unbalanced position endeavoring to pick

fruit at an angle and a distance from the ladder so as to cause her and the ladder to become unbalanced and to fall, or, because of the way in which she fell and the ladder fell, she did not set it properly in the first instance, or in the use of the picking bag she positioned it so that it obstructed a balanced use of the ladder and put her into an unbalanced position with respect to the ladder, or she was not attentive to the fact that she was in an unbalanced position, or was not paying sufficient attention to the fact that in the use of the ladder she could not extend her body to the degree and angle which she must have done, or she permitted herself to slip on the rung of the ladder on which she was standing so that she did not have a firm footing.

In addition, these defendants contend that, if there were any defective condition or conditions in the ladder amounting to negligence as claimed by the plaintiffs, the plaintiff Kent Wong became responsible therefor for the reason that, when the ladders were furnished to the Wong Family, it was requested verbally that he report any defect in their ladders that might arise or become noticeable in their use of the same, to which he assented verbally as a part of his employment with these defendants. That, if such a defect arose, then he breached his contract of employment, by which he and the other said plaintiff are bound, since he, Kent Wong, failed to report any defect, let alone any defective condition rendering the ladder unsafe

for ordinary use in the orchard, and, had there been any such defective condition arise or become noticeable, the same would have been thereupon remedied. That the claimed defects would come under such contract of employment.

Contentions of Defendant

Dr. James E. Zimmerman

It is the contention of Dr. James E. Zimmerman that the circumstances of his employment require and authorize him to arrange for the immediate treatment and surgical care of Rose Wong by a specialist in that line of work and that he obtained for Rose Wong the services of Dr. Leland R. Lugar, an orthopedic surgeon of Yakima, who undertook her care and surgery upon her admission to the defendant hospital and that the post-operative and operative procedures employed and to be employed upon Rose Wong were determined by said Dr. Lugar.

It is further his contention that any standard of what should or should not be done by the attending doctor insofar as the administration of the tetanus antitoxin or gas gangrene antitoxin or any other preventive in cases of this type was met; that gas gangrene will develop and does develop regardless of whether preventives are or are not given, and that there is no causal connection between the administration or non-administration of any such antitoxins or preventives in this case and the injuries or damage of which plaintiff Rose Wong complains.

That at all times plaintiff was in the hospital and subsequent thereto, she received proper medical attention; and there is no injury or damage of which plaintiff complains which is attributable to any conduct of the defendant Dr. James E. Zimmerman.

Contentions of Defendant Yakima Valley Memorial Hospital Association

It is the contention of the defendant Yakima Valley Memorial Hospital Association that the plaintiff received proper hospital care and, further, that her care administered by servants of the hospital was care that was ordered by the doctors and in keeping with medical instructions given. It is further the position of the hospital that the allegations set forth by plaintiff's complaint and bill of particulars do not constitute actionable negligence on the part of the hospital.

It is the further contention of the defendant hospital association that it is entitled by cross claim to a judgment against the plaintiffs for the reasonable and agreed value of the hospital care and service which it furnished during the hospitalization of Rose Wong, which said sum the hospital association contends is in the reasonable and agreed amount of \$1,492.57.

Issues of Fact

The following are the issues of fact to be determined by the jury herein:

1. Was the ladder furnished by defendants

Laura Swier and Walter Swier so defective and unsafe in the respects previously set out herein that it was not a safe ladder for the use for which it was intended and furnished, according to the standard of the law of the State of Washington?

2. Did the plaintiff Rose Wong assume the risk, if any, of said conditions, if any, and the risk of using the ladder in the condition in which it actually was?

3. Was the plaintiff Rose Wong negligent in the use of the ladder in the respects previously alleged?

4. May the defendants Walter Swier and Laura Swier properly assert as a defense to plaintiffs' claim herein that the additional party plaintiff Kent Wong breached his contract of employment in failing to report any alleged defective conditions of the ladder involved in this action?

5. Was there any negligence of omission or commission on the part of Dr. James E. Zimmerman or Yakima Valley Memorial Hospital Association or either of them which was a proximate cause of injury and damage to the plaintiff Rose Wong?

6. What damage, if any, was occasioned Rose Wong as a proximate result of the negligence, if any, of the defendants Walter Swier and Laura Swier?

7. What damage, if any, was occasioned plaintiff Rose Wong as a proximate result of the negligence of Dr. James E. Zimmerman and defendant

Yakima Valley Memorial Hospital Association or either of them?

8. May the defendant Yakima Valley Memorial Hospital Association properly assert a cross claim for hospital care and service which it furnished to plaintiff Rose Wong and, if established, is the defendant Yakima Valley Memorial Hospital Association entitled to have judgment upon a cross claim against the plaintiffs for the reasonable value of the hospital care and service it furnished to Rose Wong which it alleges to be in the sum of \$1,492.57?

Exhibits

The following exhibits were produced and marked and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be.

Plaintiffs' Exhibit:

1. Ladder. The ladder is in the possession of Mr. Homer B. Splawn, counsel for defendants Swier, and is available for inspection at any time.

Defendants' Exhibits:

1. Admission and discharge card for plaintiff from Yakima Valley Memorial Hospital Association.

2. Nurses' record.

3. Hospital file.

8. Pharmacy record at hospital.

The following articles to be used as exhibits by

the defendants were not presented at this pre-trial conference, but will be made available to all counsel at least three days before trial:

4. X-rays of Drs. Lynch and Downing.
5. X-rays of Dr. Angland.
6. X-rays of Dr. Zimmerman.
7. Hospital bill.
9. Ten or less photographs of ladder and site.
10. Ten or less ladders.
11. Ten or less ladder top assemblies.
12. Box of dirt.
13. Picking bag similar to one being used by plaintiff at time of fall.
14. Loose apples.
15. Steel wire.

It Is Hereby Ordered that the foregoing constitutes the pre-trial order in the above entitled cause, and that upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended except by consent of the parties or by order of the Court to prevent manifest injustice.

Dated this 13th day of February, 1958.

/s/ SAM M. DRIVER,
Judge.

The foregoing form of pre-trial order is hereby approved.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
Attorneys for Plaintiffs.

/s/ HOMER B. SPLAWN,
 Attorney for Defendants Walter
 Swier and Laura Swier.

/s/ JOHN GAVIN,

/s/ ROBERT R. REDMAN,

/s/ JOHN S. MOORE,

Attorneys for Defendant Dr.
 James E. Zimmerman.

GAVIN, ROBINSON &
 KENDRICK,

/s/ By JOHN GAVIN,

/s/ ROBERT R. REDMAN,

/s/ GEORGE MARTIN,

Attorneys for Defendant Yakima Valley Memorial
 Hospital Association.

[Endorsed]: Filed February 13, 1958.

[Title of District Court and Cause.]

REQUEST FOR ADDITIONAL INSTRUCTIONS

Come now the plaintiffs, by their attorneys, and request this Honorable Court to give to the jury the Instructions attached hereto, Numbered 19 to 21, being in addition to instructions previously tendered by plaintiffs.

Dated this 28th day of March, 1958.

/s/ THOMAS K. HUDSON,

/s/ ALICE LOVELAND,

/s/ GEORGE H. MULLINS,

Attorneys for plaintiffs.

Instruction No. 19

You are instructed that a party to a law suit is bound by the statements and testimony of his own witnesses. The defendants Swier are bound by the testimony of their witnesses who testified that the ladder was not at the time of trial in the same condition as when previously examined by them.

Instruction No. 20

You are instructed that a party's falsehood or other fraud in the preparation and presentation of his case, his fabrication, alteration and all similar conduct, is an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the case's lack of truth and merit. That inference does not apply to any one fact in the case, but operates strongly against the whole mass of facts constituting his case.

You are therefore further instructed that the changes or alterations in the ladder which occurred subsequent to the time of the accident on October 17, 1955, cast suspicion on the whole of the defense of Swiers and create a strong presumption that the ladder on the date of the accident was defective.

Instruction No. 21

You are instructed that all efforts by a party to a suit, directly or indirectly, to destroy, alter, fabricate or suppress evidence is in the nature of an admission by such party that he has no sufficient

case unless aided by suppressing evidence, or by the alteration or fabrication of more evidence.

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

VERDICT

We, The Jury In The Above Entitled Cause, find for the defendants.

/s/ KENNETH B. ELLEDGE,
Foreman.

If we find in favor of the Wongs—were your instructions to the effect—that we were to consider her remaining 25 years and 77 days—for a method of compensation—Yes or No.

/s/ KENNETH B. ELLEDGE,
Foreman.

[Endorsed]: Filed March 28, 1958.

In The District Court of the United States, Eastern
District of Washington, Southern Division

No. 1137

ROSE WONG and KENT WONG, her husband,
Plaintiffs,

vs.

WALTER SWIER and LAURA SWIER, hus-
band and wife, Defendants.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver presiding, with all parties appearing by counsel and the issues having been duly tried, and the jury, on the 28th day of March, 1958, having rendered a verdict for the defendant,

It Is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff his costs of action.

Dated at Yakima, Washington, this 28th day of March, 1958.

STANLEY D. TAYLOR,
Clerk,

/s/ By THOMAS GRANGER,
Deputy.

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT and TO ENTER JUDGMENT
FOR PLAINTIFFS, OR IN THE ALTER-
NATIVE FOR A NEW TRIAL

Come now the plaintiffs, by their attorneys, and move this Honorable Court to set aside the verdict and judgment against the plaintiffs entered thereon, and to enter judgment for the plaintiffs in accordance with their Motion for Directed Verdict, or if the foregoing motion be denied, to set aside the verdict and judgment entered thereon and grant to plaintiffs a new trial for the following reasons, to-wit:

(1) The Court should have granted plaintiffs' Motion for a Directed Verdict at the close of all the evidence because defendants' evidence was insufficient in law.

(2) All the evidence is insufficient in law to form a basis for a verdict in favor of the defendants.

(3) The verdict is contrary to law.

(4) The verdict is not sustained by sufficient evidence.

(5) The verdict is against the weight of the evidence.

(6) The verdict is against the law and the evidence.

(7) The court erred in denying plaintiffs' Motion for a directed verdict in their favor at the close of all the evidence.

(8) The evidence shows that the proximate cause of plaintiff Rose Wong's injuries was the defective ladder.

(9) The evidence shows that the ladder was in the possession of the defendants Swier at all times and that said ladder had been tampered with.

(10) That the court erred in instructing the jury relative to contributory negligence, relative to an unavoidable accident and relative to assumption of risk for the reason that said doctrines had no application in this case.

(11) That the court erred in refusing plaintiffs' requested Instruction No. 19.

(12) That the court erred in refusing plaintiffs' requested Instruction No. 20.

(13) That the court erred in refusing plaintiffs' requested Instruction No. 21.

(14) Under the pre-trial order and all of the evidence in the case the verdict should be in favor of the plaintiffs.

(15) That the jury misunderstood the measure of damages as shown by the question attached to the verdict and believed that they had to give \$100,000 or nothing.

(16) Plaintiffs further rely upon the Affidavits

hereto attached and by reference made a part hereof.

Dated this 3rd day of April, A.D. 1958.

/s/ THOMAS K. HUDSON,

/s/ ALICE LOVELAND,

/s/ GEORGE H. MULLINS,

Attorneys for Plaintiffs.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 4, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF VINCENT A. NOGA

State of Washington,
County of Yakima—ss.

Vincent A. Noga, of lawful age, being first duly sworn upon his oath deposes and says:

That he was a juror on the duly empaneled jury which sat in the case of Rose Wong, plaintiff, vs. Walter Swier and Laura Swier, defendants, being Civil Action No. 1137, in the United States District Court for the Eastern District of Washington, Southern Division, which jury returned a verdict on the 28th day of March, A.D. 1958, in favor of the defendants;

That the members of the jury found in their deliberations that the ladder which was in evidence, being designated as plaintiff's exhibit 1, had been tampered with; and further found that the sub-

stance on the bolts connecting the hinge assembly with the top of the ladder was not paint but was putty and ascertained this fact both by smelling said substance and by tasting the same.

Further affiant saith not.

/s/ V. A. NOGA.

Subscribed and sworn to before me this 5th day of April, A.D. 1958.

[Seal] /s/ GEORGE H. MULLINS,
Notary Public. My Commission Expires: December 4, 1960.

[Endorsed]: Filed April 7, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT MASTERMAN

State of Washington,
County of Yakima—ss.

Robert Masterman, of lawful age, being first duly sworn, upon his oath deposes and says:

That he was a juror on the duly empaneled jury which sat in the case of Rose Wong, plaintiff, vs. Walter Swier and Laura Swier, defendants, being Civil Action No. 1137 in the United States District Court for the Eastern District of Washington, Southern Division, which jury returned a verdict on the 28th day of March, A.D. 1958 in favor of the defendants;

That the members of the jury found in their de-

liberation that the ladder which was in evidence, being designated as plaintiff's exhibit 1, had been tampered with; and further found that the substance on the bolts connecting the hinge assembly with the top of the ladder was not paint but was putty and ascertained this fact both by smelling said substance and by tasting the same.

Further affiant saith not.

/s/ ROBERT MASTERMAN.

Subscribed and sworn to before me this 6th day of April, A.D. 1958.

[Seal] /s/ GEORGE H. MULLINS,
Notary Public. My Commission Expires: December 4, 1960.

[Endorsed]: Filed April 7, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF GORDON BECK

State of Washington,
County of Benton—ss.

Gordon Beck, of lawful age, being first duly sworn, upon his oath deposes and says;

That he was a juror on the duly empaneled jury which sat in the case of Rose Wong, plaintiff, vs. Walter Swier and Laura Swier, defendants, being Civil Action No. 1137 in the United States District Court for the Eastern District of Washington, Southern Division, which jury returned a ver-

diet on the 28th day of March, A.D. 1958 in favor of the defendants;

That there was no finding by the members of the jury that the ladder in evidence, being Plaintiff's Exhibit 1, had been tampered with; no vote or finding by the jury was taken or made in that respect; the jury discussed the question of whether the ladder had been tampered with, but no vote was taken or conclusion arrived at that it had been tampered with; the majority of the members of the jury never smelled or tasted any substance on the bolts at the top and no conclusion was arrived at concerning such matters.

/s/ GORDON E. BECK.

Subscribed and sworn to before me this 8th day of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public. My Commission Expires: January 23, 1960.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF HOMER B. SPLAWN

State of Washington,
County of Yakima—ss.

Homer B. Splawn, the attorney of record herein for the defendants, Walter Swier and Laura Swier, herein, being first duly sworn, on oath deposes and says:

That he is said attorney of record; and that subdivision (15) of the motion to set aside the verdict and judgment and enter judgment for the plaintiffs or, in the alternative, for a new trial, herein, is erroneous, as:

There was nothing and there is nothing attached to the verdict herein; the yellow piece of paper appearing in the file herein was handed to the bailiff, as this affiant has been informed by both the bailiff and Thomas Granger, deputy clerk, probably forty-five minutes before the jury returned its verdict, so that the same is no part of the verdict and is not connected therewith; such piece of paper in no wise furnishes a basis for any such belief as is indicated in said subdivision (15); and it is perfectly obvious that whatever inquiry the jury may have had in mind, the same was resolved by the jury and thereafter it returned its verdict herein, which is an absolutely unconditional verdict.

/s/ HOMER B. SPLAWN.

Subscribed and sworn to before me this 9th day of April, 1958.

[Seal] /s/ ROBERT I. BOUNDS,
Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF KENNETH B. ELLEDGE

State of Washington,
County of Benton—ss.

Kenneth B. Elledge, being sworn, on oath says:
I was foreman on the jury in the case of Rose
Wong vs. Walter Swier and wife, Civil Cause No.
1137.

There was speculation as to whether or not the
ladder in evidence had been tampered with and the
speculation was that someone on either side could
have done it just as well. If it had been tampered
with: This was speculation only, and there was no
finding, conclusion or ballot on that question at all.
This speculation concerning tampering had no bear-
ing at all upon the verdict. There was no finding
that the substance on the bolts was putty.

/s/ KENNETH B. ELLEDGE.

Subscribed and sworn to before me this 11th day
of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public. My commission
expires January 23, 1960.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF WARD M. FRANCIS

State of Washington,
County of Yakima—ss.

Ward Francis, being sworn, on oath says:

I was a juror on the jury in the case of Wong vs. Swier, United States District Court Civil Cause No. 1137.

There was no finding on the part of the jury that the ladder in evidence had been tampered with; there was no ballot or vote taken to affirm or disregard that such had been the case; there was speculation as to its having been tampered with by unknown parties and as to its not having been tampered with at all; no conclusion was arrived; it was felt that there was no evidence that it had or had not been tampered with; such speculation had no bearing upon the verdict; as to any substance on the bolts or lack of substance on the bolts there was no conclusion arrived at by the members of the jury.

/s/ WARD M. FRANCIS.

Subscribed and sworn to before me this 15th day of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public. My commission
expires January 23, 1960.

[Endorsed]: Filed April 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT MASTERMAN

State of Washington,
County of Yakima—ss.

Robert Masterman, being sworn, on oath says:

I was a juror in the case of Wong v. Swier, Civil Action No. 1137.

So far as I could determine, any tampering with the ladder had no bearing on the decision of the jury.

/s/ ROBERT MASTERMAN.

Subscribed and sworn to before me this 16th day of April, 1958.

[Seal] /s/ HOMER B. SPLAWN,
Notary Public in and for the State of Washington,
residing at Yakima. My commission expires
January 23, 1960.

[Endorsed]: Filed April 16, 1958.

In the District Court of the United States, Eastern
District of Washington, Southern Division

Civil No. 1137

ROSE WONG,

Plaintiff,

vs.

WALTER SWIER, LAURA SWIER, DR.
JAMES E. ZIMMERMAN, DR. LELAND
LUGAR and YAKIMA VALLEY MEMO-
RIAL HOSPITAL ASSOCIATION,

Defendants,

KENT WONG,

Additional Plaintiff.

ORDER DENYING MOTION TO SET ASIDE
VERDICT AND JUDGMENT AND TO
ENTER JUDGMENT FOR PLAINTIFFS,
OR IN THE ALTERNATIVE FOR A NEW
TRIAL

Upon the files and records herein, including the Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs, or in the Alternative for a New Trial, such motion having duly come on to be heard by the above entitled Court on Monday, May 19, 1958, and the same having been duly argued, and the Court having duly considered and denied the same, now, in pursuance thereof:

It Is Hereby Ordered that said motion be, and the same is hereby, denied.

Dated May 28th, 1958.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ HOMER B. SPLAWN,
Attorney for Defendants Swier.

Notice of Mailing Attached.

[Endorsed]: Filed May 28, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Come now the plaintiffs, Rose Wong and Kent Wong, and hereby file their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, from that certain order and judgment entered by the Honorable Sam M. Driver, Judge, on the 28th day of March, A.D. 1958, in favor of the defendants Walter Swier and Laura Swier, and against the plaintiffs herein.

Dated this 13th day of June, A.D. 1958.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
Attorneys for plaintiffs.

Notice of Mailing Attached.

[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

COST BOND

Know All Men by These Presents: That we, Rose Wong, and Fidelity and Deposit Company of Maryland, are held and firmly bound unto Walter Swier and Laura Swier in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said Walter Swier and Laura Swier, their heirs or assigns, to which payment well and truly to be made we bind ourselves, our successors or assigns, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of June, A.D. 1958.

Whereas, lately on the 28th day of March, A.D. 1958, in the United States District Court for the Eastern District of Washington, Southern Division, in a suit pending in said court between Rose Wong, plaintiff, and Walter Swier and Laura Swier, defendants, judgment was rendered against the said plaintiff, Rose Wong, and the said plaintiff has taken an appeal to the United States Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such that if the said plaintiff Rose Wong shall prosecute said appeal to effect, and answer all costs if she fails to make good her plea, then the above obligation to be void, else to remain in full force and virtue.

ROSE WONG.

[Seal] FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,
/s/ By CLARENCE T. PAMP,
Attorney-in-fact.

[Endorsed]: Filed June 16, 1958.

[Title of District Court and Cause.]

MOTION

Come now the appellants by their attorneys and move this Honorable Court for an Order directing that appellants' Designation of Contents of Record on Appeal be accepted without the inclusion of the transcript of testimony at the trial, and that they be permitted to file such transcript on a subsequent date and as soon as received from the Reporter, and

As Grounds for This Motion, state unto the Court as follows:

1 That on the 21st day of May, A.D. 1958, counsel ordered the transcript from the Reporter, Mr. C. R. Shuff, and on the 23rd day of May, 1958, counsel received from said Reporter an acknowledgment of the order for the transcript; that said transcript is not yet ready for delivery to counsel; that as soon as said transcript is delivered by the Reporter to counsel, it will be filed herein.

/s/ THOMAS K. HUDSON,
/s/ ALICE LOVELAND,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 3, 1958.

[Title of District Court and Cause.]

CERTIFICATE

I Hereby Certify that I duly served the Designation of Contents of Record on Appeal, Statement of Points Relied Upon, and Motion by depositing in the United States mail, postage prepaid, true and correct copies thereof addressed to Mr. Homer B. Splawn, Attorney at Law, Larson Building, Yakima, Washington, on the 2nd day of July, 1958.

/s/ ALICE LOVELAND.

[Endorsed]: Filed July 3, 1958.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard upon the motion of appellants for permission to file the Designation of Contents of Record on Appeal without filing the transcript of proceedings and that they be permitted to file such transcript at a subsequent date, and the Court having read said motion and being fully advised in the premises,

It Is Hereby Ordered that the Designation of Contents of Record on Appeal by appellants be and the same hereby is accepted without the simultaneously filing of the transcript, and

It Is Further Ordered that such transcript may be filed at a subsequent date.

Done in Open Court this 16th day of July, A.D. 1958.

By the Court:

/s/ SAM M. DRIVER,
Judge.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause, as called for in Appellants' Designation filed on July 3, 1958, and as called for in Appellees' Designation filed on July 8, 1958.

Date of Filing	Title of Document
8/29/56	Complaint.
1/22/57	Motion to Make More Definite and Certain (Filed on behalf of Defendants, Swier).
4/30/57	Plaintiffs' Motion to add Party Plaintiff.
6/6/57	Order adding Party Plaintiff.
3/25/57	Answer of Defendants Swier.
6/10/57	Request and Motion for Jury Trial (by Defendants Swier).

- 6/10/57—Application for Leave to Amend Answer of Defendants Swier to Complaint.
- 6/10/57—Answer of Defendants Swier with respect to Additional Party Plaintiff.
- 7/17/57—Objection of Plaintiffs to Request and Motion for Jury Trial.
- 2/13/58—Pre-Trial Order.
- 3/28/58—Plaintiffs' tendered Instructions, Nos. 19, 20 and 21.
- 3/28/58—Verdict of Jury with question attached.
- 3/28/58—Judgment on Jury Verdict.
- 4/4/58—Plaintiffs' Motion to set aside Verdict and Judgment and to enter Judgment for Plaintiffs or, in the alternative for New Trial.
- 4/16/58—Affidavit of Gordon Beck.
- 4/16/58—Affidavit of Homer B. Splawn.
- 4/16/58—Affidavit of Kenneth B. Elledge.
- 4/16/58—Affidavit of Ward M. Francis.
- 4/16/58—Affidavit of Robert Masterman.
- 4/7/58—Affidavit of Vincent A. Noga.
- 4/7/58—Affidavit of Robert Masterman.
- 5/28/58—Order Denying Motion for New Trial, etc.
- 6/16/58—Plaintiffs' Notice of Appeal.
- 6/16/58—Cost Bond on Appeal.
- 7/3/58—Designation of Record.
- 7/3/58—Statement of Points to be Relied Upon.
- 7/3/58—Motion for permission to file Designation of Record without Transcript, Transcript to be filed at later date.
- 7/3/58—Certificate of Mailing Designation, Statement of Points and Motion.

7/16/58—Order allowing Designation to be filed without Transcript.

7/8/58—Appellees' Designation of additional portions of record.

7/16/58—Record of Proceedings at the Trial.
Plaintiffs' Exhibit No. 1—Ladder.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District, this 21st day of July, 1958.

[Seal] STANLEY D. TAYLOR,

Clerk,

/s/ By THOMAS GRANGER,

Deputy Clerk.

In the District Court of the United States, Eastern
District of Washington, Southern Division

Civil No. 1137

ROSE WONG and KENT WONG, husband and
wife, Plaintiffs,

vs.

WALTER SWIER, LAURA SWIER, DR.
JAMES E. ZIMMERMAN, DR. LELAND R.
LUGAR, and YAKIMA VALLEY MEMO-
RIAL HOSPITAL ASSOCIATION,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable Sam M. Driver, Judge,
and a jury.

Date: March 24, 1958. Time: 10:00 o'clock a.m.

Appearances: For the Plaintiffs: George H. Mullins, Attorney at Law, Miller Building, Yakima, Washington. Thomas Hudson, Attorney at Law, 335 Petroleum Club Building, 110 16th Street, Denver 2, Colorado. Alice Loveland, Attorney at Law, 335 Petroleum Club Building, 110 16th Street, Denver 2, Colorado. For the Defendants: Homer B. Splawn, for the Defendants Swier, Attorney at Law, Larson Building, Yakima, Washington. John Gavin, appearing for Gavin, Robinson and Kendrick, for the Defendants Zimmerman and Yakima Valley Memorial Hospital Association, George M. Martin, Attorney at Law, Larson Building, Yakima, Washington; John S. Moore, Attorney at Law, Miller Building, Yakima, Washington. [65]*

* * * * *

WALTER SWIER

the defendant, called and sworn as an adverse witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Walter Swier.

Q. And where do you reside, sir?

A. Cowiche.

Q. And what is your employment?

A. I am a fruit grower, self-employed.

Q. Do you have any other employment?

A. Oh, I have got some sidelines. [71]

* Page numbers appearing at bottom of page of Reporter's Transcript of Record.

(Testimony of Walter Swier.)

Q. (By Mr. Hudson): Were you so engaged on October 17, of 1955?

A. I was hauling apples out of the orchard.

Q. I mean, you were operating this fruit ranch at that time? A. Right, yes, sir.

Q. What fruit were you picking at that time?

A. Apples.

Q. Are you acquainted with the plaintiff, Rose Wong? A. Intimately.

Q. And Kent Wong? A. Yes, sir.

Q. How long have you known them?

A. Oh, I have known Rose Wong, I should say, twelve or thirteen years.

Q. And what is the nature of that acquaintanceship?

A. Well, I knew of her years before. Then she was a missionary in China and, well, she came home when there was [73] trouble in Japan with China and she resided on our place for some months in a tenant house before her husband came back from China.

Q. In other words, your acquaintanceship with her was of a religious nature?

A. Somewhat sympathetic, also; she needed a home.

Q. Now, among the admissions that we have here, Mr. Swier, which we do not need to prove is the fact that Rose Wong was in your employ at that time? A. That is right.

Q. And that she was picking apples?

A. Right.

(Testimony of Walter Swier.)

Q. And that she was using the ladder furnished by you in that work? A. Correct.

Q. And that you and Mrs. Swier were under the duty to provide her with a safe ladder and that she fell and broke this leg at the ankle. Now, do you recall, Mr. Swier, who called Dr. Zimmerman?

A. My wife was instructed to call him.

Q. As far as you know, then, Mrs. Swier called him? A. That is right.

Q. I mean, Mrs. Swier called Dr. Zimmerman?

A. Mrs. Swier called Dr. Zimmerman, correct; the office, at least. [74]

Q. Now, do you recall the time that the apple harvest or apple picking commenced?

A. I was going to look that up but I didn't, but we had been picking, oh, perhaps six or eight days.

The Court: I understood that Mrs. Swier was instructed to call Dr. Zimmerman?

A. Correct.

The Court: Do you know by whom she was instructed to call him?

A. Well, we said, "Call a doctor immediately." She says, "I will call him." There was plenty of confusion, your Honor.

The Court: Mrs. Wong didn't tell your wife to call the doctor, did she?

A. Not to my knowledge. I wasn't there.

The Court: It was somebody else suggested to her or instructed your wife to call the doctor, is that right?

(Testimony of Walter Swier.)

A. Well, she might have called herself if she heard of it from the children.

The Court: All right, go ahead. I was just trying to make it clear, was my only purpose in it, was to make it clear for the jury.

Q. (By Mr. Hudson): At least, the instruction to call Dr. Zimmerman did not come from Mrs. Wong, is that correct? A. Sir? [75]

Q. At least, the instruction to call Dr. Zimmerman did not come from the injured lady, Mrs. Wong?

A. Well, I couldn't verify that, sir, because I wasn't there until sometime after it happened. I was on the other side of the place, oh, perhaps a quarter of a mile away.

Q. Now, Mr. Swier, did you make any inspection of your ladders that you used in the harvest that year? A. Yes, sir, all of them.

Q. What kind of inspection did you make?

A. Well, my son works for me and each season before picking we go over all the ladders and we tighten them and see if they were in what we would call a usual condition.

Q. Well, then, you personally did not do that?

A. Oh, yes, my son and I together.

Q. And your statement is that you and your son went over all the ladders and tightened them up and did whatever was necessary?

A. That is right.

Q. Did you make any test of these ladders before they were given to the pickers to use?

(Testimony of Walter Swier.)

A. Yes, sir, anything questionable is discarded.

Q. I didn't understand that.

A. I say, anything we question is discarded.

Q. What would cause you to question the ladder? [76]

A. Well, if there was a loose step or the side come loose, or if there is too much play in the third leg.

Q. You mean in the yoke? A. Sir?

Q. In the yoke of the third leg?

A. Well, you can tell by feeling of the third leg whether there is excessive looseness.

Q. Did you pick out the ladder that was given to Mrs. Wong for use?

A. Well, I didn't pick it out for her, but the ladders were all given to them by me, these four, or four in the family picking.

Q. And had those four been inspected by you?

A. Yes, sir, and by my son.

Q. No, not your son, by you?

A. Yes, I brought them personally, as I recall.

Q. You looked those over yourself?

A. As I recall.

Q. Do you recall having done anything to any one of these four ladders that you gave to the Wongs in the nature of repair, before delivering them?

A. No, I couldn't say that, not when I delivered them, that is true.

Mr. Hudson: Pardon me, a minute.

Q. In testing these ladders, Mr. Swier, did you

(Testimony of Walter Swier.)

make any other tests [77] besides that of swinging the tongue or the third leg, as you call it?

A. Yes, sir, we usually tighten them and climb on them to see if there is any give in the sides. There are adjustments on both sides on the outer edge with burrs to keep the side rigid.

Q. If there is any give, why, you take that up?

A. That is right.

Q. That is about the extent of your inspection?

A. Correct.

Mr. Hudson: I believe that is all at this time, sir.

The Court: Just a minute.

Mr. Splawn: Your Honor, I shall develop the situation much more fully with Mr. Swier in my case in chief and so I will have no questions now.

The Court: Do you have any cross examination?

Cross Examination

Q. (By Mr. Gavin): I might, just for clarification, ask Mr. Swier, your ranch where this accident occurred is located how far from Yakima?

A. Approximately thirteen miles.

Q. Is it in or near the town of Cowiche?

A. Well, it's about southwest, approximately, I don't know [78] what you call the town of Cowiche, there is no town.

Q. It's where the stores are, and whatnot, along the highway near Dr. Zimmerman's office?

A. From the stores, the supermarket, it's about half a mile west and about a quarter mile south.

Q. The reason I asked you this, Mr. Swier, some

(Testimony of Walter Swier.)

of our jurors here may not be familiar with the area, some of them come from the lower valley, your Honor, here; it might be geographically of interest to locate the place where this accident occurred. It is out in a general farming area, an orchard unit, is it not, west of the City of Yakima?

A. That is right.

Q. And are you familiar with where Dr. Zimmerman's office is? A. Yes, sir.

Q. It is near your place and near the supermarket, is that right? It's out in the same general area?

A. Well, if you are speaking of Dr. Zimmerman's office now?

Q. Yes.

A. That is in the same area as the supermarket.

Q. Well, it's roughly also about thirteen miles west of the City of Yakima?

A. That is right, we are about the same distance from the City of Yakima. [79]

Q. Dr. Zimmerman was at this time, and still is, the only doctor right out in that area, right?

A. That is right.

Q. So, if someone out there calls a doctor, or the doctor in the Cowiche area, that is Dr. Zimmerman? A. Correct.

Mr. Gavin: That is all.

Redirect Examination

Q. (By Mr. Hudson): One other question, Mr. Swier. The orchard is the heavy fertilized piece of ground, is it not?

(Testimony of Walter Swier.)

A. Well, now, I would qualify that. That is a comparative statement, a matter of opinion.

Q. Well, let's put it this way: Do you use fertilizer with an orchard? A. Some.

Q. How much do you use to an acre?

A. Well, the last three years I have used no nitrogen at all and I use, oh, about 600 pounds of phosphorus, organic phosphate.

Q. How long has that orchard been in?

A. Oh, it's perhaps thirty years old.

Q. Do you fertilize each year? A. No, sir.

Q. Every other year? [80]

A. Approximately.

Mr. Hudson: I believe that is all at this time.

The Court: Any other questions? That is all, then, for the present.

(Witness excused.)

Mr. Hudson: Call Dr. Zimmerman, please, for cross-examination.

The Court: Yes, all right.

DR. JAMES E. ZIMMERMAN

called and sworn as an adverse witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Would you state your name, please, sir?

A. James Edward Zimmerman.

Q. What is your occupation?

A. I am a physician and surgeon.

(Testimony of Dr. James E. Zimmerman.)

Q. Where do you reside?

A. In Cowiche, Washington.

Q. Pardon me?

A. In Cowiche, Washington.

Q. And where is your medical office?

A. In Cowiche, Washington.

Q. You are acquainted with the plaintiff, Rose Wong?

A. Yes, I am, since the time of her accident; I didn't know [S1] her before that time.

Q. Do you know who called you on October 17, 1955, from the Swier ranch?

A. No, I don't. I didn't receive the call personally. My office manager received the call and notified me that someone had called from the Swier ranch.

Q. Who is your office manager?

A. Mrs. Mary Pooler.

Q. Is she still with you, Doctor?

A. No, she hasn't been with me since June of 1957 because of the acquisition of a new member to her family.

Q. Do you know where she resides?

A. She lives on Summit View Extension, which I think is Route 2, Yakima, Washington.

Q. I am a stranger, is that near here?

A. That is approximately halfway between the City of Yakima and Cowiche.

Q. In other words, it isn't very far away?

A. No. No, sir.

Q. Did you go to the Swier ranch?

(Testimony of Dr. James E. Zimmerman.)

A. No, I didn't, I could not leave at the time because I was busy with a patient and when Mrs. Pooler called and said they needed a doctor, I sent my office nurse with some medicine in case it was needed and to evaluate the seriousness of the injury. [S2]

Q. Where did you then see Mrs. Wong?

A. The first time I saw Mrs. Wong was in surgery at Yakima Valley Memorial Hospital. Dr. Lugar had asked me to help him with the surgical part of her case.

Q. Now, you didn't see her until she was in surgery? A. No, sir.

Q. And what was the injury that she had sustained?

A. She suffered a comminuted and compound fracture of the lower third of both bones of her left leg, which would be the tibia and fibula. She had a laceration, an open wound, in the medial part of the inner part of her left leg where the fragments had pierced the skin and muscle in that area.

Q. To put that in the words of the layman and so that I will understand it, possibly the jury would appreciate it, could you get that down into broken bones at a certain location?

A. Well, I am sure most of these gentlemen understand what a compound comminuted fracture is. It's one that is broken in many places and one that protrudes through the skin.

Q. The compound fracture indicates that the bone has come through the flesh and skin?

(Testimony of Dr. James E. Zimmerman.)

A. Yes, sir.

Q. And that was the condition of this lady? [83]

A. That was the condition of this wound.

Mr. Hudson: Do you have any X-rays?

Mr. Gavin: These are the ones that you requested, the hospital produced them.

Clerk of the Court: Which X-rays are these?

Mr. Gavin: These were X-rays that we were requested to produce, the X-rays that were taken or kept at Memorial Hospital. This is an envelope of X-rays that were handed to me by Mr. Hunt, saying that these are X-rays that they have had at the hospital available for use here any time we want them.

Clerk of the Court: We have assigned three different groups of X-rays. I wonder if you can tell me if those are one of those groups?

Mr. Hudson: I am afraid we are going to have to let the doctor do that.

Mr. Gavin: Yes, I am sure they are not Dr. Enlow's X-rays because he would have taken them by his own personal examination. I am sure they are taken by Dr. Lynch. They must be those that are denominated No. 4.

Q. (By Mr. Hudson): Doctor, I am going to hand you several X-ray negatives, if that is what they are called, and have you, if you will be good enough, to sort out the ones which were taken on the day that Mrs. Wong was admitted to the hospital.

A. Well, these X-rays are all numbered at the

(Testimony of Dr. James E. Zimmerman.)

time with a little machine and I don't know if you can see here or not, but it gives the name of the doctor, the name of the hospital, the Yakima Valley Memorial Hospital, the number of the patient that is given when she is admitted, and the doctor's name, in this case Dr. Lugar, and the name of the patient, the date and the part that was taken. I just wanted to explain that to them; and these are all X-rays that were taken while Rose Wong was at Yakima Valley Memorial Hospital. Those were taken on the 17th, but those were what we call post-reduction X-rays.

The Court: Do you want them in chronological order?

A. That is what I am trying to do, your Honor.

The Court: That is right, yes.

A. This is probably the first one, (witness places X-ray in shadow box). It's one of the first ones that was taken on the 17th of October, 1955, which shows a left view. The left indicates the left extremity, and it is of the lower left leg and foot. Can you all see that? In this region you can see an obvious displacement and alteration of these bones. It may be a little hard for some in the back to see them.

Mr. Hudson: Could we move that table closer, would it help in any way? They say they can see them. [85]

A. (Continuing) You have to look at X-rays closely.

(Testimony of Dr. James E. Zimmerman.)

This one has my name on it and 10/17/55.

The Court: Just a moment. It seems to me that it would make a better record here of them if these were marked to show us to what the Doctor is referring. None of them have been marked so far and it would be impossible to determine from the record what he is talking about. Will you hand the clerk the one you just commented on, please, Doctor?

A. This is the first one, your Honor.

The Court: Taken by which doctor?

Mr. Hudson: By Dr. Zimmerman.

Clerk of the Court: Your Honor, that must be a member of group seven, then, the numbers that were reserved for the group taken by Dr. Zimmerman, and I will mark this No. 7-A.

Mr. Gavin: Doctor, I think to prevent any confusion, these are the ones that were taken by Dr. Lynch out at the Memorial Hospital. They are all cataloged on the pretrial order, I understand, as Exhibit 4.

The Court: Well, they should be given sub-designations, letters, or something, to show what the Doctor is talking about.

Mr. Gavin: Well, I think, as Mr. Taylor commented, these were Dr. Zimmerman's X-rays.

Clerk of the Court: I am sorry, I thought that is [86] what I asked the doctor, if it was taken by Dr. Zimmerman?

A. No, my name was on the slip because I requested the X-ray, but these were all taken by

(Testimony of Dr. James E. Zimmerman.)

the radiology department of the Yakima Memorial Hospital.

Clerk of the Court: The pre-trial order shows that those were X-rays taken by Dr. Lynch, is that correct?

Mr. Hudson: Yes, at the request of Dr. Zimmerman.

A. May I explain why my name appears on the first one?

Mr. Hudson: Not at this time.

The Court: No, I think your counsel may bring that out later.

A. All right. This is the first one. This is the film that I made when I admitted her to Memorial Hospital.

Q. (By Mr. Hudson): May we designate that one, Doctor, as being the one that has been under discussion?

A. The one that I just showed you.

(Whereupon, said X-ray was marked as Plaintiff's Exhibit No. 4-A.)

Q. (By Mr. Hudson): And it is designated as?

A. 4-A.

Q. 4-A.

A. Now, the next two were taken after her surgery.

Q. Do you have another one?

A. No, that is the only one that was taken.

Q. Is this the only one that was taken prior to surgery? [87]

(Testimony of Dr. James E. Zimmerman.)

A. This is the only one that was taken prior to surgery.

Q. In other words, 4-A is the only pre-surgery picture?

A. Yes, sir, it's the only one that is here and the only one that I know of. All the X-rays are kept in a common envelope, even for patients that may have been admitted several years before; that way, for filing reasons, they are kept in there. These three were taken the same day.

Mr. Hudson: Let's get them identified.

The Court: Have them marked.

Clerk of the Court: 4-B, 4-C and 4-D.

(Whereupon, said X-rays were marked for identification as Plaintiff's Exhibits Nos. 4-B, 4-C and 4-D, respectively.)

A. (Witness places photograph in shadow box.) These are what we call post-reduction films, or after surgery. It shows the light, very white article, which is a metal plate, and I think if you look closely you can see three metal screws, and this is just another view of the same fracture. This (indicating) is still another view of the same fracture, three views taken at different positions to show us the arrangement of bones after her surgery. We are primarily interested in her tibia, the main bone. These have Dr. Lugar's name on them. [88]

* * * * *

CHAUNCEY W. McDONALD

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Chauncey W. McDonald.

Q. Where do you reside?

A. 3410 Fruitvale.

Mr. Hudson: Yakima? Your Honor, would you inquire of the jury if they are hearing everything?

The Court: Can you hear in the back end and the upper corner?

Juror No. 6: Sometimes not too well.

The Court: I see. I usually inform the witnesses, I don't think I have this morning, that the acoustics, that is to say, are very bad in this room. It's a typical courtroom in that respect; it's hard to hear, you have to keep your voice up and speak slowly.

Q. (By Mr. Hudson): I wonder if you would restate your name and where you reside?

A. Chauncey W. McDonald, 3410 Fruitvale, Yakima.

Q. And with whom are you employed?

A. I am with the Department of Labor and Industries as safety inspector, in that capacity.

Q. And how long have you been employed as a safety inspector for the State of Washington?

A. Approximately nine years.

Q. In the course of your work, your safety inspection work, just what is it that you do?

(Testimony of Chauncey W. McDonald.)

A. General safety inspection. It requires the inspection of any hazard in which an employee is involved.

Q. Do you receive any schooling from the State in connection with safety factors?

A. Yes, sir, we do.

Q. How old are you, Mr. McDonald? [98]

A. Forty-eight pretty soon.

Q. What has been your vocation prior to your employment with the State of Washington as safety engineer?

A. I don't understand what you mean by "vocation"?

Q. What do you do for a living?

A. I was a construction man.

Q. And how long were you connected with construction? A. I started way back in 1922.

Q. And were you in construction work continuously up until the time you were employed by the State?

A. With the exception of a year or two in depression times.

Q. What type of construction were you engaged in?

A. Well, anything from house building to any type of commercial or bridge.

Q. During the course of this construction work did you have any occasion to use ladders?

A. Yes, we did.

Q. Did you use them a great deal, or a little?

(Testimony of Chauncey W. McDonald.)

A. I would say whenever needed, which is approximately one-fifth or sixth of the time that you work in construction.

Q. With ladders? A. That is right.

Q. Now, during your work with the State of Washington, have you had any occasion to familiarize yourself with [99] what we refer to as a three-legged ladder? A. Yes, I have.

Q. In the course of your work have you had occasion to, at various times, inspect these three-legged apple-picking ladders? A. I have.

Q. I am going to call your attention to a ladder which is lying here and which, for the purposes of identification, has been marked Plaintiff's Exhibit 1.

Mr. Splawn: I believe that is right.

Q. (By Mr. Hudson): And ask you to come and look at the ladder and tell me if you have ever seen that ladder before?

A. (Witness inspects ladder) Yes, I have.

Q. Where did you see it?

A. At the Dependable Ladder Storage.

Q. When is the first time you saw it?

A. Approximately four or five months ago, the latter part of August or first part of September.

Q. Who asked you to look at it?

A. I believe Mr. George Mullins contacted me to look at it.

Q. And have you seen it more recently?

A. Yes, just a couple of days ago, a couple or three days ago.

(Testimony of Chauncey W. McDonald.)

Q. That was at my request, wasn't it? [100]

A. That is right.

Q. Did you give it a close inspection both times?

A. Yes, I have.

Q. Pursuant to the inspection which you have given it, have you arrived at any conclusion about it? [101]

* * * * *

Q. (By Mr. Hudson): Have you used these picking ladders, such as this ladder which we have in evidence here?

A. Will you say that question over again, please?

Q. Are you familiar with or have you used ladders such as this ladder we have in evidence here? A. Yes, I have. [110]

Q. And you have inspected this ladder not only today but two or three times previously?

A. That is right.

Q. In your opinion is the ladder which we have in evidence marked Plaintiff's Exhibit 1 a reasonably safe ladder to be used in the picking of apples?

Mr. Splawn: If your Honor please, I object to that for the reason that this man hasn't been qualified as being in the apple business in this valley and to know what is commonly used throughout the Yakima Valley, so far as picking ladders are concerned. He, apparently, is an employee of the Department of Labor and Industries, which does

(Testimony of Chauncey W. McDonald.)

not cover the field of agriculture and he has not been qualified thus far to meet the standard.

The Court: I don't think he is testifying as to any particular standard but as to whether this is safe for a human being to use, isn't that correct?

Mr. Hudson: That is correct.

The Court: Overruled.

A. It is not.

Q. (By Mr. Hudson): Can you tell from the witness stand there or by demonstration with the ladder upon what you are basing your opinion that it is not a reasonably safe ladder?

A. I would like to demonstrate with the ladder, if I may? [111]

The Court: All right.

Q. (By Mr. Hudson): Sure.

A. (Witness approaches ladder) When you stand the ladder up (witness raises ladder to vertical position) here, regardless of how you stand it for picking you set it up in here, and as long as your weight is down on this bottom you are riding on these two legs, but the minute that you go over, you see what happens to any ladder, you reach over and your ladder goes at an angle, so naturally it throws your weight with nothing under here at all, and causes it to become weak. That is one of the things that I noticed about this ladder, and while I was facing the jury here on this particular side, if you will notice, there is some cracks up along the side-rail here where that ladder has

(Testimony of Chauncey W. McDonald.)

been in a twist before, and it has cracks, so it isn't even safe to stand on the top step of this particular ladder. You can use it up to approximately here (indicating). You are reasonably safe because you are using your weight on these two legs. If you go beyond that, it is not a safe ladder.

Q. Now, is there a looseness in the top yoke, Mr. McDonald?

A. (Witness swings leg of ladder back and forth) Quite a little bit. There has to be in order to put this in a twist like it went into. [112]

Q. Can you, Mr. McDonald, by having the ladder down and reversing it so the jury can see it, the looseness of the yoke; maybe you had better demonstrate it.

A. (Swings leg back and forth.)

Q. Now, just a minute, Mr. McDonald. What is it that causes all the play in here on each side of the yoke?

A. The holes are wore on the middle.

Q. To a marked degree?

A. Either the holes or the bolts; I didn't take it apart to find out, but there is play in there, more than is needed to run it through. If your holes fit the bolts properly, you wouldn't have that wiggle in it.

Q. The play would not be there?

A. That is right.

Q. Mr. McDonald, is the opinion that you have expressed an opinion which represents your thoughts in the use of this particular ladder in an orchard,

(Testimony of Chauncey W. McDonald.)

that it is unsafe, that it is not reasonably safe to be used in an orchard for apple picking?

Mr. Splawn: I renew this same objection.

The Court: Yes, all right, the record may show your objection. You may answer.

A. I may? Yes, it is considered an unsafe ladder because of the looseness on the top step.

Mr. Hudson: You may examine. [113]

Cross Examination

Q. (By Mr. Splawn): Have you, Mr. McDonald, ever been engaged in the orchard business in the Yakima Valley or anywhere else?

A. Not in the orchard business, no.

Q. In your work for the Department of Labor and Industries, do you cover agriculture?

A. Sometimes.

Q. The law under which you operate, does it apply to agriculture?

A. We have what they call elective adoption, and there is some adoptions that use that particular classification.

Q. Is it your position that the defendants Swier in this particular case are under the Department of Labor and Industries?

Mr. Hudson: If the Court please, I am going to object. This man is not a Court, he is not trying to establish what jurisdiction Mr. Swier is under.

Mr. Splawn: I may go into, as the basis of his opinion, as to whether he is applying certain rules.

(Testimony of Chauncey W. McDonald.)

The Court: Yes, I don't think you can ask him whether the defendant Swier is under the Department of Labor and Industries or not.

Q. (By Mr. Splawn): In other words, you have no set knowledge that they are under a certain set of rules that [114] your job is to inspect and follow through?

A. I might explain it this way, that I got complaints on the particular industry that is operating, that is the only way I know that they are operating, and I go out to make the inspections.

Q. Now, I take it that you have never owned or operated an orchard? A. That is right.

Q. And have you ever been around the valley and in the orchards of the valley to any extent, so as to become familiar with what growers here ordinarily use? A. Yes, I have.

Q. Is it your testimony that ladders such as this are not in common and ordinary use in the orchards of this valley?

The Court: Now, just a moment; do you mean this type of ladder?

Mr. Splawn: This ladder, with its features, everything about it, every feature about it.

Q. Is it your testimony that ladders of this character with the physical aspects to it that this particular ladder has, is not in common or ordinary use of the orchards of this valley?

A. Not in late years, it is not as common as it used to be.

Q. Is it still common, is it your testimony? [115]

(Testimony of Chauncey W. McDonald.)

A. There are still some individuals that use a ladder of that kind, yes, that is right.

Q. Yes. In other words, ladders such as this one are still in common use, are they not, in the Yakima Valley?

A. They are leaving that particular one.

Q. My question was, ladders like this one, and I refer to all of these features, are still in common use in the Yakima Valley in the apple and orchard business?

Mr. Hudson: Just a minute, let's make it clear, do you mean ladders that are in the condition that this one is, with the loose yoke and the split side?

Mr. Splawn: I have tried to make it as plain as I can; all of the features of this ladder.

Q. Is it your testimony that ladders such as this one, with those features, whatever they are, and you have referred to a couple of them, are not in ordinary or common use still in orchards of this valley?

The Court: Just a moment.

Mr. Hudson: If the Court please, that is not his testimony nor was that the testimony on direct examination. The testimony on direct examination was that ladders in the condition of this were not reasonably safe to use in orchards for apple picking. He expressed no opinion as to what all the ladders in the Yakima Valley were or the condition they were in. [116]

The Court: I think I should sustain the objection. If you mean that this general type of ladder

(Testimony of Chauncey W. McDonald.)

The Court: Yes, I think the last remarks should be stricken as to what can be done with a new ladder, that is counsel's testimony.

Q. (By Mr. Splawn): I take it you have never done that? A. No, I haven't.

Q. Would you be surprised that you can take a new ladder and make it go the same way?

The Court: I think that is testimony, Mr. Splawn, that is precisely what I sustained the objection to before. You can ask him, but not tell them, that it can be done.

Q. (By Mr. Splawn): You don't know whether it can be done or not?

A. I never tried it on a new ladder.

Q. You never tried it on a new ladder? I understood from your testimony and I noticed your hand at the time you were talking was up here (indicating)? A. Approximately there. [119]

Q. As long as you are up this far (indicating) this is a reasonably safe ladder?

A. That is a reasonably safe height on that ladder.

Q. So, if Mrs. Wong, for example, were standing on this rung, or anyone else, and the ladder was set properly, you would expect nothing to happen, would you?

A. That is right, because you have got the brace, you are putting your weight on your two legs on the back side there, the same two legs, unless it's in a hole in soft ground.

Q. Do you suppose, Mr. McDonald, there is any

(Testimony of Chauncey W. McDonald.)

risk if weight were applied up there, of this tongue slipping out on this surface?

A. I think it would. Well, maybe not on this surface here, if someone would hold this tongue down at the base in here (indicating).

Q. About how much do you suppose I weigh?

A. Oh, you weigh about 145 pounds.

Q. Now, this ladder is now set properly, is it not? A. I presume it is.

Q. I see. Incidentally, the sides here, are they all tight, do you know? Have you found anything?

A. I think the rungs are all right; I checked them.

Q. The rungs are all right, are they? I see. Incidentally, to your knowledge this ladder has been in storage for [120] at least since last August that you know of? A. That is right.

Q. It has been dry storage, too, hasn't it?

A. That is right.

Q. How long prior to last August this ladder has been in dry storage, you don't know?

A. I don't know, but I do know that moisture in the air like we had last night and the day before will get in and cause tightness on wood.

Q. Well, the times that you have seen this ladder has been out in the open or has it been in a dry storage? A. It was in a dry storage.

Q. It was in a dry storage? Now, as a person climbs this ladder, how does the weight start to shift now, as you climb higher?

(Testimony of Chauncey W. McDonald.)

A. As you climb higher you get more and more up here (indicating), but you don't release your guide down below here until you are up and start putting more weight onto this particular part.

Q. As I climb higher I put more weight on that? A. Yes.

Q. On that?

A. That is what I am doing, because it starts to hold.

Q. I see. I have some boxes of dirt; I am all right so far, okay, reasonably safe (indicating)?

A. If you go much more, that leg is starting to walking already on you. [122]

* * * * *

Q. (By Mr. Splawn): Mr. McDonald, I was interested in your remark that up to the fourth step from the top, when you get to that the ladder is reasonably safe.

A. That is true, because you have two rigid legs which are bearing your weight. The higher you go, the more of a tripod you get into. When you get up there, you have to do the tight-rope act or balancing act, because of the fact that the thing is loose under your feet. Whenever you are standing up on something that is loose under your feet, you have got to be an expert in balance to be able to stay on top of there.

Q. You would say that you would have to be a tight-rope walker in order to stay up there?

A. I didn't say that; similar to a tight-rope

(Testimony of Chauncey W. McDonald.)

walker, but you would have to be an expert balancer. [127]

Q. You would have to be an expert balancer? Now, isn't it a fact the higher you go on that ladder the more weight that you have directly applied to that top up there? A. That is true.

Q. That is true?

A. Yes, that's what putting the pressure onto this particular thing here will do. It's a pretty tough and solid stick but some of them will bow and that loosens the big bolt up there; it will go into a twist. After you go up here (indicating) this particular leg started to walk back on you, showing that you are getting high enough, as a safety factor.

Q. That leg started to walking back?

A. That particular corner leg started to lift and walking back when you were onto this particular step right here, I believe it was, and I started to go to grab it.

Q. Is it your testimony that if you had that ladder out in an orchard on flat ground, let's say, and someone climbed that ladder and got up there, the fourth, third, or second rung from the top, that that ladder would start to doing something?

A. It's possible.

The Court: Pardon me, but I think in common fairness, I think I should instruct the jury to disregard the [128] witness' testimony as to what happened when Mr. Splawn was on the ladder. The reason I am asking them to disregard it is that I

have, for obvious reasons, ruled that we shall not have these demonstrations of somebody getting up at the top of this ladder in the courtroom here. I don't think we can simulate the conditions that were present in the orchard. I don't think it's possible to do that. Since I have ruled out the demonstration, I don't think any part of it should be considered at all. [129]

* * * * *

ROSE WONG

the plaintiff, called and sworn as a witness in her own behalf, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Rose Wong.

Q. Will you try and keep your voice up, Mrs. Wong, so that all the jury can hear and we can hear? A. I will.

Q. Where do you reside, Mrs. Wong?

A. At 1207 N.E. Fremont Street, in Portland, Oregon.

Q. What is your now age? A. I am 47.

Q. And your age in October of 1955?

A. Was 45.

Q. What is your occupation, Mrs. Wong?

A. I am a missionary and housewife.

Q. How long have you followed the vocation of being a missionary? A. Twenty-one years.

Q. You are married? A. Yes, I am.

Q. And what is the name of your husband?

A. Kent Wong.

(Testimony of Rose Wong.)

Q. Is he of Chinese origin?

A. Yes, he is.

Q. Do you have any children?

A. Yes, I do, I have five children.

Q. And what are their general ages?

A. They range between the age of 18 and 7.

Q. And their sex?

A. One son and four daughters.

Q. What formal education have you had, Mrs. Wong?

A. I have had grade school, high school, some business college education, and training for missionary work.

Q. Have you had any experience in picking apples?

A. None previous to the time of 1955.

Q. Where were you residing?

A. I was residing in the tenant house on the Swier farm.

Q. Now, Mrs. Wong, it has been stipulated that the following admissions have been made, those are: that you were on October 17, 1955, in the employ of Walter Swier and Laura Swier, and as such an employee used a ladder which was furnished by the defendants, that is Walter Swier and Laura Swier; and that the defendants Walter [139] Swier and Laura Swier were under the duty to furnish you with a safe ladder; that you received or sustained injuries by reason of the fall from this particular ladder in the course of your employment; that the defendant, James E. Zimmerman, was contacted

(Testimony of Rose Wong.)

with reference to your treatment and care; that you were taken to and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington, which hospital was operated by the defendant Yakima Valley Memorial Hospital Association; that while you were a patient in this hospital that gas gangrene developed; that the medical bill of Dr. James E. Zimmerman is unpaid and that the bill was not rendered until June 9, 1957, and that the hospital bill rendered to you by the Yakima Valley Memorial Hospital is unpaid. Those are items which are admitted and will not have to be established otherwise. (Q.) Did you call Dr. Zimmerman, Mrs. Wong? A. No, I did not.

Q. Do you know who called Dr. Zimmerman?

A. Yes, I do.

Q. How do you know?

A. The party told me so themselves.

Q. Who is the party that you refer to?

A. Mrs. Swier.

Q. Mrs. Swier advised you that she had called Dr. Zimmerman? A. Yes, she did. [140]

Q. Had you requested her to call Dr. Zimmerman? A. No, I had not.

Q. Now, the injury that you received is the injury that was described by Dr. Zimmerman on the stand yesterday, is that not correct?

A. Yes, it is.

Q. Can you tell me what took place upon your arrival at the Memorial Valley, Yakima Valley Memorial Hospital, on October 17, 1955?

(Testimony of Rose Wong.)

A. I was taken on the stretcher into the emergency room or department of the hospital. I was placed on the X-ray table, given a shot of morphine. They took X-rays, by "they" I mean the nurses who received me at the door, and subsequently was put on another stretcher.

Q. Were you given any anesthetics at that time?

A. No, I was not. I was given a shot of morphine, was all.

Q. Now, what happened subsequently?

A. I was taken to surgery.

Q. And what occurred there, if you recall?

A. Nurses and an orderly received me into the surgery, I was put on the operating table, the pins and combs were taken out of my hair; they removed the clothing from the upper portion of my body and stated to me that they would give me a spinal injection. Dr. Zimmerman stood to my left, slightly to the rear. He asked [141] if I was in good health or had had any serious illness and my reply was "No." After that the injection was given and the lower part of my body became numb. Then I was turned back onto the operating table, flat on my back, and my arms stretched out in this manner (indicating). They began to then remove my slacks and socks and an anesthetist prepared my arm for an injection of anesthesia. I remember counting to 42 and lost consciousness.

Q. Do you know whether or not you were given tetanus anti-toxin at that time?

A. I was not.

(Testimony of Rose Wong.)

Mr. Gavin: I object to the answer as not responsive, your Honor. He asked whether she knew or not.

The Court: Yes, I think you should answer whether you know or not.

A. To my knowledge I was not.

Mr. Gavin: Well, that still doesn't answer it, your Honor.

The Court: Well, I assume that you inferred while she was conscious?

Mr. Hudson: Yes, sir.

The Court: It will be so understood.

Q. (By Mr. Hudson): The question is, do you know whether you were given any tetanus antitoxin? [142]

A. I know I was not given any.

Q. Well, you know? A. I know.

Q. Now, the question is, were you given a tetanus antitoxin shot? A. I was not.

Mr. Gavin: Well, of course, again I object. She just said she became unconscious.

The Court: Well, so far as you know, you were not while you were conscious, is that your answer?

A. Yes, sir.

The Court: All right.

Q. (By Mr. Hudson): Now, while you were conscious in this particular operating room or at any time there on the 17th of October, 1955, do you know whether you did or did not receive a gas gangrene antitoxin shot?

Mr. Gavin: I object to that. He asks her if she

(Testimony of Rose Wong.)

knows at any time while she was conscious or otherwise.

The Court: I understood the question to be while she was conscious in the operating room, or any other time, if "any other time" referred to the operating room.

Mr. Hudson: I assume that without knowing while she was unconscious from an anesthetic she would not know what was done.

The Court: I don't think we need to quibble about [143] this. These men are reasonable men, they know she couldn't tell when she was unconscious what she was given.

Q. (By Mr. Hudson): Do you know whether you were or not?

A. I do not know what I was given.

Q. Now, were you given on October 17, 1955, a gas gangrene antitoxin shot? A. I was not.

Q. And following the anesthesia, the operation which was described by Dr. Zimmerman was performed, is that correct?

A. It was performed, yes, sir.

Mr. Gavin: I object to the answer "performed," your Honor. The operation was performed by Dr. Zimmerman; she wouldn't know that.

The Court: Well, just what was the last question and answer?

(Last question and answer read.)

The Court: She didn't testify that it was performed by Dr. Zimmerman.

Q. (By Mr. Hudson): Can you describe what

(Testimony of Rose Wong.)

your condition was in the hospital during the next week following the operation?

A. Yes, if you will permit me to put on my glasses to check a few notes I myself have made. During the following week I constantly felt pain that is quite [144] indescribable in any language that I can think of or use. About the second day my leg had swollen until the cast became very painful and tight. I complained of that and the cast was split and I shall say here that the cast reached from below my knee to the joint in my big toe. It was split, then, down the center in the hopes that would give me relief, but the leg continued to swell and continued to become so painful that I could not endure it, so I continually asked for help. Toward the end of the week the upper part of my leg, from my knee to my hip, became swollen and blotchy in color, reddish-purple blotches. It was very swollen, to such a degree that I was not able, of myself, to turn my body over. During that week there was a condition in the room that drew large green blowflies, which continually lighted upon the cast at any moment that it was not covered. I was feverish continually, and many times would push the covering that was on the hospital bed away from my body, and when I did the blowflies would gather upon the cast, and I grew very apprehensive about it and as many times as I could I would pull the sheet to the best of my ability or have someone pull it over the cast in order to protect it from the blowflies.

During the week, the forepart of the week, I was

(Testimony of Rose Wong.)

[145] put in a wheelchair and I became violently ill. While yet in my bed I had a perspiration that is not common. It was oily and foul-smelling, and it would come out on my forehead and run down my cheeks and was on my hands. When they put me into the wheelchair that day I became very ill and the perspiration became quite excessive.

I managed to remain in the wheelchair until they came to relieve me and put me back into my bed. Subsequently, the next day, they tried to put me in the wheelchair again, and I refused, stating to them clearly how deathly ill I had become.

Mr. Gavin: Your Honor, I don't want to interrupt, but she keeps saying "them." It is of some importance to identify who she is talking about, at least to me.

The Court: Yes, I think that should be specified.

A. Thank you, sir.

Mr. Gavin: And if she knows who they are by name, I would like to know that.

A. I am speaking of the attendants, the nurses who attended me.

The Court: You don't know their names, I presume?

A. No, I am not acquainted.

The Court: All right.

A. (Continuing): So, those two days they refrained from putting me in the wheelchair. Come the latter part of [146] the week, they insisted, the nurses insisted, against all my protests, that I must

(Testimony of Rose Wong.)

be put in the wheelchair. The nurses called the orderly and I was put into the wheelchair and wheeled out of my room to the end of the hall and left unattended. I became very, very ill and I gripped the arm of the chair in this manner (indicating), in order not to pitch forward, and searched to the best of my ability to see if I could find a nurse who would come and wheel me back. I could find no one. I sat there for a few minutes and knew then that if I could not be put back to bed I would either faint or fall from my chair, and with all the strength I had I turned the chair and wheeled myself to the door of my room.

When I arrived there an orderly came by and I told him of my condition and showed him that I was wringing wet with this oily perspiration, and explained to him I had become so terribly ill.

Q. (By Mr. Hudson): Will you pause for just a moment, Mrs. Wong?

Might counsel approach the bench?

(Whereupon, counsel approached the bench.)

Mr. Gavin: Dr. Zimmerman is required to be up at the hospital on an important matter at eleven, on some kind of surgery, and counsel assured me this morning that he felt [147] that this witness, plus any cross examination that might be had, would continue for our morning session, or would not require the presence of the doctor or that he be on the stand or produce any records. We want him to remain, but he has to go up there and we would

(Testimony of Rose Wong.)

like to ask him to be excused until after lunch, if the Court has no objection.

The Court: Yes. Will this testimony involve him?

Mr. Hudson: No, it won't involve the doctor.

The Court: Until noon? I have no objection, he may be excused.

Mr. Gavin: I didn't want him to just get up and leave, and I wonder if the Court would say that he may be excused?

The Court: Until the afternoon session?

(Whereupon, the proceedings were resumed in open court within the hearing and presence of the jury.)

The Court: I am informed that Dr. Zimmerman has an urgent professional call and he may be excused until one-thirty this afternoon.

All right, proceed.

Q. (By Mr. Hudson): You may proceed.

A. Your Honor, may I call for the last question?

The Court: Perhaps if you ask for another question it might help here. I think she was describing her experience in the hospital. Do you wish her to continue with that? [148]

Q. (By Mr. Hudson): Yes, sir. Would you continue your explanation of what occurred the week immediately following October 17, 1955, and I believe at the time of interruption you were referring to the wheelchair incident.

A. The attendants, the orderly and the nurses

(Testimony of Rose Wong.)

then wheeled me on into the room and put me back on my bed. During that first week my leg was so painful and, as I had explained, had become so swollen to the hip that I was unable to move my body, but the nurses who attended me each time I rang the bell, would bring to me a bedpan, which is used for ordinary patients in the hospital. That bedpan is from four to six inches thick. They would very roughly shove that thick bedpan under me and I would cry out with the pain of it, but I was never given a fracture pan to use.

On one occasion, especially, I remember ringing the bell for assistance with the bedpan. The nurse came and I asked her for the bedpan. I had been given an intravenous feeding. Intravenous feedings react on the kidneys.

Mr. Gavin: Well, now, your Honor, I don't think she is telling what happened. She is giving some sort of an opinion about intravenous feedings.

The Court: Yes, I think that might be objectionable. [149] You should confine it to your own personal experience and what you felt about it, what you experienced.

A. (Continuing): After the intravenous feeding I had to call often for the bedpan. On one occasion they came in, the nurses came in, snatched the bedpan from the small, I guess you would call it commode, that sits by the bed, shoved it roughly halfway under me, and departed. By that time I was weeping, but I managed to push the bedpan

(Testimony of Rose Wong.)

under a little farther in order to not stain my bed. However, I was not successful. I rang for the removal of the bedpan but I received no service. The lapse of time was at least a half an hour. I, finally, by my strength, pulled the bedpan out from under my back in order to relieve the excruciating pain and subsequently spilled the contents.

When the nurses arrived they made it plain to me by actions, they were very rude and disgusted that my bed had become wet. They stretched a new draw sheet which goes across the bed underneath me.

After that experience, in my pain and nervous condition, I became afraid to ring the bell and would wait as long as possible in calling service. On several occasions when my bed was wet I pushed towels underneath me to avoid calling for service of the nurses.

During that week, toward the end of the week, my [150] back became so painful and the back of my neck, that by the end of the week I was drawn backwards, this causing such discomfort that I refused to let them give me any back rubs before being put to sleep at night, and I asked the nurses if I might have a foam pillow to sleep on.

In conclusion, may I say to the jury that the first week——

The Court: (Interposing) Just a moment.

Mr. Gavin: This is not testimony. She is now making an argument. I think the question and an-

(Testimony of Rose Wong.)

swer method would move us ahead much more rapidly.

The Court: Yes, I think so. The purpose now is to have the witness state the relevant facts concerning her experience in the hospital. All right.

Q. (By Mr. Hudson): During this week's period, were you given drugs for relief of pain?

A. Yes, I was.

Q. Now, what occurred, if you recall, on October 24, 1957, I mean '55.

A. On the morning of October 24 breakfast was not given me and I was prepared for surgery. They bound my head in a white cloth and put me upon a stretcher.

Q. Were you then taken to surgery?

A. I was. [151]

Q. Who was in surgery, if you recall?

A. Dr. Lugar, nurses and an orderly.

Q. And what was done at that time?

A. I was received in the operating room by the nurses and orderly. I was put upon the operating table. The doctor pried off the cast with his hands, during which time I cried with pain. When the cast was pried off they x-rayed the limb, then the doctor removed the sutures. After removing the sutures he discovered a condition in the leg that caused him to squeeze it twice. When he squeezed it, it exploded with blood and pus, and I cried out, "This is murder." The orderly pushed with some force on my shoulders because I had leaned up in an effort to save myself some of the pain, and he pushed me

(Testimony of Rose Wong.)

back on the table. The anesthetist tried to get a needle in my arm but was unsuccessful, and then they put a mask over my face and I grew unconscious.

Q. And there was some operation performed at that time? A. Yes, there was.

Q. Now, on that particular day, October 24, 1955, do you know or, rather, were you given anti-toxin for gas gangrene?

A. Would counsel state the time again, the date?

Q. On October 24, 1955, were you given anti-toxin for gas gangrene? [152]

Mr. Gavin: Your Honor, I am going to object to this question until we establish what this woman knows about gas gangrene antitoxin, how she knows whether it was given or not given. She has expressed no professional qualifications to answer the question.

Mr. Hudson: Possibly I can clear that up a little bit.

Q. On October 24, 1955, were you advised by anyone in the Yakima Valley Memorial Hospital that you were being given antitoxin for gas gangrene? A. I was.

Q. Do you recall who advised you?

A. A nurse.

Q. Do you recall her name?

A. No, I do not.

Q. Will you state what the nurse advised you?

A. She advised me first that they were taking a skin test. After they took the skin test they brought

(Testimony of Rose Wong.)

a large syringe and said, "Mrs. Wong, this is anti gas gangrene toxin," and they gave me the contents.

Q. Were you given, if you know, any other anti-toxin on October 24, 1955? A. No, I was not.

Q. That is, as far as you know?

A. That is right. [153]

The Court: I suppose it could be inferred, but is it your testimony that what they told you was gas gangrene antitoxin was given you intravenously?

A. No, sir, it was given me by a syringe.

The Court: All right, by a needle injection? All right, go ahead.

Mr. Gavin: May I inquire when this was.

The Court: When was that, Mrs. Wong, the 24th of October?

A. The evening, it must have been late evening.

The Court: Of October 24?

A. Yes, sir.

The Court: All right, go ahead, counsel.

Q. (By Mr. Hudson): Subsequent to this operation you returned to your room?

A. No, I did not.

Q. What occurred?

A. They put me in isolation.

Q. And what occurred then?

A. I was in isolation for the next week.

Q. Receiving treatment? A. Yes, sir.

Q. And what was the condition of your leg during the week subsequent to October 24, 1955?

A. It was very painful and to such a degree that

(Testimony of Rose Wong.)

I did not [154] sleep over 15 minutes at a time. Sir?

Q. That was during the week following October 24, 1955?

A. That is right. It was bandaged heavily and propped (indicating) quite high on the bed.

Q. Yes.

A. It was split open and drains had been put into the leg.

Q. Did you at that time, which is, now we are in the week following October 24, 1955, did you at that time or at any time make any request of Dr. Zimmerman concerning Dr. Lugar?

A. I did.

Q. What was that request?

A. I requested that he not have Dr. Lugar attend me any further.

Q. Was that request made during the week following October 24, 1955? A. Yes.

Q. Did you have further surgery while you were in the Memorial, or the Yakima Valley Memorial Hospital? A. Yes, I did.

Q. Do you recall the date of that surgery?

A. November 15.

Q. Do you know who performed that surgery?

A. No, I do not.

Q. Who did you think performed the surgery?

A. Dr. Brundage.

The Court: What was that name?

Mr. Hudson: Brundage. (Q.) You, of your

(Testimony of Rose Wong.)

own personal knowledge, don't know whether Dr. Brundage did that surgery or not?

A. No, I do not.

Q. But, in any event, there was surgery performed on November 15 of 1955? A. Yes, sir.

Q. Do you know what was done at that time?

A. They cut out the rest of the rotting flesh and put a cast to the upper calf and knee of my leg to the tip of my toes. They also cut a window in that cast.

Q. What was the window in there for, do you know? A. For the dressing of the wound.

Q. Drainage purposes? A. Yes, sir.

Q. How long did you remain in the hospital at that time? A. Until December 13, 1955.

Q. And then where did you go?

A. I returned to my home.

Q. Did you have any subsequent surgery?

A. Yes, I have.

Q. Can you tell me when that was?

A. On two occasions. One was December 13, 1956, and the [156] other in May, 1957.

Q. Now, where was the surgery performed in 1956? A. At St. Elizabeth's Hospital.

Q. Do you know who did that surgery?

A. Yes, I do.

Q. Who was it? A. Dr. Bocek.

The Court: St. Elizabeth's here in Yakima?

A. Yes.

Q. (By Mr. Hudson): Do you know what that surgery consisted of, of your own knowledge?

(Testimony of Rose Wong.)

A. Yes, I do, I was told.

Q. And what was done at that time?

A. The first time?

Q. In December of 1956.

A. Yes, the wound—

Mr. Gavin: (Interposing) Do I understand that this is something she was told or she is going to describe what was done? I didn't quite understand that.

The Court: I think she said she was told what it was, yes. I think that her testimony should be confined to her own knowledge and observation.

Q. (By Mr. Hudson): Can you state from your own knowledge and your observation what was done during the operation in December, 1956?

A. Yes, sir. The old wounds which had continued to drain [157] had been scraped and a long drain had been put in there. The ankle on the same leg had also been opened and scraped. It had broken open, running green pus for several months, and they had cut an incision to scrape the bone on that side. A drain was put in and below the drain about three stitches were put in.

Q. You say Dr. Bocek performed that operation?
A. Yes, sir.

The Court: Who is that doctor?

Mr. Hudson: Dr. Bocek.

The Court: Oh, Bocek?

Q. (By Mr. Hudson): He maintains his office here in Yakima?
A. Yes, he does.

(Testimony of Rose Wong.)

Q. Now, you also stated that there was a third operation in May of 1957? A. Yes, sir.

Q. Where was that operation performed?

A. Also at St. Elizabeth's Hospital of Yakima.

Q. And who performed that operation?

A. Dr. Bocek.

Q. And of your own personal knowledge can you tell what that operation consisted of?

A. Yes, sir, it consisted of scraping a large hole in the original wound on my ankle. That was about that big around (indicating) and the gauze was stuck in there as a [158] drain to keep the wound open.

Q. Now, when you say "That big around," would that be an inch in diameter, or an inch and a half, or two inches, how big?

A. A good inch and a half.

Q. In diameter?

A. Yes, sir, it was more of a circle and it was an inch and a half, at least.

Q. Yes. What treatment, if any, have you received since May of 1957?

A. I have received the continuous attention of Dr. Bocek in changing of the drains in the beginning, and then his constant attention of the wound which continued to drain until February, 1958.

Q. It is no longer draining?

A. It healed in the middle of February. [159]

* * * * *

Q. (By Mr. Hudson): What is the present condition of your ankle, Mrs. Wong?

(Testimony of Rose Wong.)

A. The present condition of my ankle is that it remains very painful. It is impossible for me to walk normally. I use a cane to alleviate the weight in order to alleviate the pain of walking. It is stiff, so that I can neither go up nor downstairs, except one step at a time, and with the support of a railing such as is on stairways. It is shortened.

Q. Pardon me? A. It is shortened.

Q. Are you able to do your normal housework?

A. No, I am not.

Q. Are you able to give your family the normal care? A. No, sir.

Q. How far can you walk on that leg?

A. Exerting my strength, I can walk a block.

Q. You could not accompany your family on an excursion or [165] trip? A. Oh, no, sir.

Q. Now, going back to October 17, 1955, there have been certain admissions made which I have read to you, and you were picking apples for Swiers, I suppose? A. Yes, sir.

Q. And you were using a ladder provided by the Swiers? A. Yes.

Q. Now, will you describe in your own words what took place on the morning of October 17, 1955, while picking apples for the Swiers, in the use of the ladder, which is Plaintiff's Exhibit 1?

A. The accident occurred on that morning after we had been in the orchard over an hour. I had climbed the ladder after I had set it carefully, testing it on both sides to see that it was well-balanced, and had ascended to the second rung from the top

(Testimony of Rose Wong.)

and picked the apples within reach and had turned, the apples were to the left. I turned my body slightly to the right in order that the bag which was then about full of apples would not hit on the ladder, and as I turned my body there was a quick give of the ladder. It went out from under my feet. I made a grab for a limb but could not hang on, and I fell.

Q. You were preparing to go down the ladder?

A. Yes, sir.

Q. Do you have any independent record as to how many times Dr. Zimmerman called on you while you were in the hospital?

A. No, only that I know he came each day.

Q. The doctor called on you each day in the hospital? A. Yes, sir.

Q. How often did you see Dr. Zimmerman after you left the hospital?

A. Upon the day that I left I was instructed by Dr. Zimmerman to call at his office in Cowiche within a week's time. I did this. He dressed the wound and told me to return about in three weeks. That I did. Thereafter until April 26 I saw Dr. Zimmerman on the average of three or four weeks between calls.

Q. Yes, that was April of 19—, what year?

A. 1956.

Q. In April of 1956 was there a longer period between visits?

A. No, sir, subsequent to April 26 there were

(Testimony of Rose Wong.)

two weeks that I saw the doctor every other day or every three days.

Q. And then how long was it between visits?

A. Then I continued with my monthly calls.

Q. Do you recall the last date that you saw Dr. Zimmerman, [167] roughly? A. April.

Q. Of what year? A. 1957.

Q. I wonder if you would come down from the witness stand in close proximity to the jury and turn so that they may see the scar on your leg?

A. (Witness leaves the stand and approaches the jury box.) I wonder if they can see.

Q. Wait a minute, I will give you a little help.

A. (Witness displays scar on leg.)

Q. Just go up here so that these men at the other end of the jury box can see.

A. (Witness displays scar on left leg.)

Q. Will you turn so that counsel can see?

A. (Witness displays left leg to counsel.)

Q. Will you resume the stand, please. Did all members of the jury see the scar?

(Witness resumes the stand.) [168]

* * * * *

Q. (By Mr. Hudson): Mrs. Wong, have you incurred any other obligations on which you have not received statements or bills in connection with this accident? A. Yes, I have.

Q. Can you state to whom those obligations would be due?

A. I have an obligation due Dr. Noall, of Port-

(Testimony of Rose Wong.)

land, Oregon. I have made miscellaneous purchases myself, incurring expense.

Q. Has Dr. Noall rendered you a bill?

A. Yes, he has.

Q. Where is that statement?

A. It must be in Portland, Oregon, in my stationery box.

Q. At least you don't have it with you?

A. No, sir.

Q. Do you recall the amount of the bill?

A. Yes, I do.

Q. How much is it?

A. Twenty-five dollars.

Q. Twenty-five? Do you recall the amount of your miscellaneous expenditures?

A. They approximately amount to \$150.

Mr. Gavin: Your Honor, "Miscellaneous expenditures," doesn't mean very much. [174]

The Court: No, I think they should be specified as to what they cover.

Q. (By Mr. Hudson): Is it possible for you to specify, that is, to itemize what you term "Miscellaneous expenses"?

A. Yes, generally it is.

Q. Let's try.

A. I have expended moneys for built-up shoes, in order that I might maintain a balance when I walk. I made an expenditure for a brace of \$30, which I wore some time. I have made many expenditures for various drugs, some for gauze, peroxide, pain killers, headache pills, which come in the cate-

(Testimony of Rose Wong.)

gory, when I get overwrought with pain it causes my head to throb; vaseline, bandages; that is the general expense.

Mr. Hudson: If the Court please, do you feel that is descriptive enough?

The Court: Well, in the absence of objection, I would say so.

Mr. Gavin: Well, it's a little difficult, your Honor. She has submitted a bill, I notice there, for drugs that somebody just showed me there, for a considerable amount. I presume it's the same thing she is talking about?

Mr. Hudson: No, those are drugs incurred here in Yakima at the hospital, but it is not possible at this time [175] to itemize those, and with the permission of the court we will withdraw that item.

The Court: Very well.

Q. (By Mr. Hudson): Now, you have incurred an obligation to Dr. Bocek of this city, have you not? A. Yes, I have.

Q. Have you received a statement from the doctor yet? A. Yes, I did.

Q. Where is that statement?

A. That statement was destroyed after I paid it.

Q. Do you know how much that statement was that was paid? A. Yes, I do.

Q. What was it? A. \$105.

Q. And the services of Dr. Bocek are continuing? A. Yes, sir.

Q. Have you been able to do any work since this accident? A. No, sir.

(Testimony of Rose Wong.)

Q. What were your earnings from your missionary work?

A. They would average \$350 a month. [176]

* * * * *

Q. (By Mr. Hudson): Subsequent to the accident which you [177] have described as occurring on October 17, 1955, did you ever have any conversations with Mrs. Swier, one of the defendants in this case, relative to this ladder?

A. Yes, I did.

Q. Can you identify the time?

A. Between three and four weeks after entering the hospital.

Q. Can you identify the place? A. Yes.

Q. The hospital? A. Yes, sir.

Q. And who was there?

A. Mrs. Swier and myself.

Q. Anyone else? A. No, sir.

Q. Will you state to the best of your recollection what that conversation was relative to this ladder?

A. Yes, sir. Mrs. Swier had come to visit me; it was in the morning. We were visiting when a gentleman entered the room. He desired a statement. The statement was made and I signed it and the gentleman left, after which, when he had closed the door, Mrs. Swier said, "Oh, Rose, I wish you hadn't signed that, there was something wrong with the ladder."

Q. Was there any further conversation had about it at that time? [178]

(Testimony of Rose Wong.)

A. Yes, she said it was loose, that it made it go this way (indicating).

Q. By the motion you have just made it would indicate a twist? A. Yes.

Q. Did you ever have any conversation with Mr. Swier concerning this ladder?

A. Yes, I did.

Q. Can you identify the time?

A. It was after I returned to my home from the hospital.

Q. That would be subsequent to December of 1955? A. That is right.

Q. But can you fix the time more closely?

A. I should say in the forepart of January.

Q. Where did this conversation take place?

A. At our home on the Swier ranch.

Q. And who was present?

A. Mr. Wong, my husband, who is my husband, myself, and Mr. Swier.

Q. And what was said at that time about it?

A. Mr. Swier knocked on the door and stated he had come to take Mr. Wong to look at the ladder. Mr. Wong put on his coat and went with Mr. Swier out; in a few minutes they both returned, at which time I was sitting beside the small table on which we dined. Mr. Swier [179] and Mr. Wong came in and sat down both around the table. Mr. Swier picked up a piece of paper, which was a sales ad that grocery stores put out, and it is printed on one side and blank on the other. He turned it over and

(Testimony of Rose Wong.)

he diagrammed roughly the place on the ladder which he said was defective.

Q. Where was that place on the ladder?

A. It was at the yoke.

Q. Did you ever employ Dr. Lugar to do anything for you? A. No, sir. [180]

* * * * *

Cross Examination

Q. (By Mr. Splawn): All right, thank you. I understand, Mrs. Wong, that you have been acquainted with Mr. and Mrs. Swier for quite a period of time? A. Yes, I have.

Q. And I further understand that that largely has been through missionary work?

A. Yes, sir. [182]

Q. You have been or you were actively engaged in the missionary field, I take it?

A. I was.

Q. And prior to the accident you were able to earn \$350 a month being a missionary?

A. Yes, sir, my income was an average of \$350 a month.

Q. Now, this accident happened on October 17, 1955. How long had you been at the Swier place by that date?

A. We came to the Swier ranch in the forepart of June.

Q. 1955? A. Yes, sir.

Q. And was the reason for coming to the Swier place to find work in order to support yourself?

A. In order to augment our income, yes, sir.

(Testimony of Rose Wong.)

Q. At that time you were not, or during that period of time from the latter part of June, 1955, to the date of the accident, you were not actively engaged in the missionary field, were you?

A. I beg your pardon, I was, you know.

(Last question read.)

A. That is right.

Q. (By Mr. Splawn): So at least during that period of time I assume, Mrs. Wong, that you were not earning \$350 a month.

A. Personally, I was not at that time. [183]

Q. And what you were doing, or you and your husband, or your husband, was farm chores provided by Mr. Swier for you folks to do so as to sustain yourselves and your children?

A. No, I did no farm chores.

Q. Your husband did, I take it?

A. No, I think he did not.

Q. I see. Well, then, you just lived on the Swier place without doing anything that summer on the Swier place?

A. No, sir, he was hired to do specific work.

Q. Well, something to do with the farm?

A. Yes, sir.

Q. I see. And that was the family's income, I take it, for that period of time?

A. That was part of it.

Q. Yes. Had some other part of your family, and by that I refer to some of your children, had the Swiers been taking care of them for quite a

(Testimony of Rose Wong.)

period before you folks arrived there in the latter part of June, 1955?

A. My three children had their home with the Swiers for about eight months, yes, sir.

Q. Yes, and that was before you and Mr. Wong came with the rest of the family?

A. That is right.

Q. And the Swiers were looking after the children, were [184] they not, and taking care of them?

A. Yes, sir, they were.

Q. And they were doing that, of course, without any compensation from you folks?

A. No, sir.

Q. What is that? A. No, sir.

Q. You mean to say you were paying the Swiers for the care of the three older children for the eight months that they were there before you arrived and Mr. Wong arrived with the rest of the family?

A. I, myself, sent them \$60, and we were to go to the foreign field and part of our contract was that moneys be sent to the Swiers to recompense them for the care of our children.

Q. How much did you pay the Swiers or have to pay the Swiers, then, for the care of the three older children for the eight months time before you folks arrived there?

A. The Swiers, themselves, asked for \$60 a month for clothing and incidentals.

The Court: Really, counsel, is that material as to whether the Swiers were liable for this injury?

Mr. Splawn: Not for that purpose.

(Testimony of Rose Wong.)

The Court: I know what the purpose is, but I think [185] it has gone far enough.

Q. (By Mr. Splawn): Now, I take it then, during the period of time prior to coming to the Swier ranch there, to work there, or your husband to work there, that you were actively engaged in the missionary field, were you?

A. I was actively engaged in missionary work, religious work.

Q. And you were earning the compensation up to that time that you testified you were earning?

A. Yes, sir.

Q. Now, while you were at the Swier ranch did you earn that kind of compensation?

A. Did I earn that kind of compensation?

Q. Yes. A. No, I, personally, did not.

Q. I see. Were you there by any chance during any harvest of any fruit that summer and before apple picking began in the fall?

A. My husband and I worked in the pears, yes, sir.

Q. Was there any work done in the cherries, for example?

A. My husband worked in the cherries, I did not.

Q. I see. Did you have anything to do with the cherry harvest on the place?

A. No, sir. [186]

Q. Oh, incidentally, had you been raised on a farm?

A. My girlhood was spent on a farm.

(Testimony of Rose Wong.)

Q. I see. Now, you mentioned something about pears; did you pick any pears for Mr. Swier that late summer or early fall? A. Yes, I did.

Q. And about how long did that last, the pear picking? A. Picked about a week.

Q. And you worked every day, did you?

A. I worked every day for a week.

Q. I see. And did you use a ladder?

A. Yes, sir.

Q. Did you pick separately from your husband or did you work with him on individual trees?

A. I worked with my husband.

Q. Did you take a row, for example, by yourself, and handle a pear row, for example, on your own without your husband being with you and working with you? A. No, sir.

Q. You had a ladder? A. Yes, sir.

Q. Did you handle the ladder or did your husband? A. I handled the ladder.

Q. And when you were going to pick a pear tree, did you set your ladder? [187]

A. Yes, sir, I did.

Q. And when you were picking around the tree, did you move your ladder around the tree?

A. Yes, I did.

Q. And when you moved to another tree, for example, did you yourself move your own ladder?

A. Sometimes.

Q. And so far as setting of the ladder is concerned during the pear picking time, did you always set your own ladder? A. Most of the time.

(Testimony of Rose Wong.)

Q. I see. Did you understand then about the setting of a ladder or about the use of a ladder?

A. Yes, sir.

Q. There was no need for anyone to educate you or teach you how to set a ladder, you already knew?

A. I learned from observing, sir.

Q. I see. And in the setting of a ladder you have learned to set it properly and carefully?

A. Yes, sir.

Q. And you were aware of that by the time that pear picking came along that fall, were you, how to use a ladder and how to set it? Had you learned to do that by that time?

A. No, sir, I had done no picking previous to that. [188]

The Court: You mean by the time the apple trees came along? You said "the time pear picking," you meant apple picking?

Q. (By Mr. Splawn): By the time the pear picking came along, had you learned during the pear picking or prior to pear picking?

A. I learned during the pear picking.

The Court: You had no experience prior to pear picking? A. No, sir.

Q. (By Mr. Splawn): And by the time the pear picking came along had you learned to use and set a ladder? A. Yes, sir.

Q. So, as has been suggested, by the time apple picking came long you had learned to use and set ladders?

A. I could manipulate it, I could set it.

(Testimony of Rose Wong.)

Q. I see, without any edification or assistance, I assume?

A. Unless the grass was unduly long.

Q. Now, the pear picking that you did, was that on the Swier place? A. Yes, sir.

Q. And after the pear picking did you then start to pick apples for Mr. Swier?

A. There was a period between.

Q. I see. As best you recollect, when did that apple [189] picking commence?

A. The first part of October.

Q. Would you say it was in, I am trying to pin it down, as best you can, it would be about the first week in October?

A. Either the last of the first week or the first of the second week, yes, sir.

Q. Did you pick continuously, then, from the beginning of apple picking to the date of the accident? A. Yes, sir.

Q. And you worked every day, I assume?

A. Yes.

Q. And during that apple picking season about how many hours each day, if you can state, did you pick apples?

A. I would be going out to the orchard about 8:00 o'clock in the morning after the children had left for school, and I would remain until the noon hour, come home for lunch, and I would go out again about 1:00 and remain until the children had come home from school, and then pick with them until about 5:00 o'clock.

(Testimony of Rose Wong.)

Q. And that was every day?

A. That was every day.

Q. Now, during the course of apple picking up to the 17th of October, had you set your own ladder or did you have someone do it for you? [190]

A. I set my ladder.

Q. You set your own ladder? And picked your own trees? A. Not entirely, sir.

Q. I see. And so far as that picking was concerned, did you have any difficulty or trouble with respect to your ladder at any time?

A. No, sir.

Q. So far as the area was concerned occupied by the Swier orchard, was it hillside land or level?

A. At what particular time?

Q. Well, for example, the apple orchard where you picked?

A. The apple orchard was practically level.

Q. The apple orchard was practically level. And, if you know, how was it irrigated?

A. By an irrigation system that is corrugated, I would say corrugated.

Q. Corrugated? And were you aware of that during the course of your picking apples up until the date of the accident?

A. Most certainly.

Q. At any time up to the 17th of October, did you ever complain to Mr. Swier or anyone there about your ladder or about anything concerning the ladder? A. No, sir.

Q. If there had been anything to complain

(Testimony of Rose Wong.)

about, would you [191] have had any reluctance or hesitancy to speak to Mr. Swier about it?

Mr. Hudson: I am going to object to that question. That question presupposes that this lady would have enough knowledge of a ladder to know something was wrong.

Mr. Splawn: I say "anything to complain about," anything she learned to complain about. I don't think there is anything wrong with the question, your Honor.

The Court: I will let the answer stand again. Would you have had any reluctance to complain about the ladder if there was anything to complain about, that is what you asked, wasn't it?

A. No, sir.

Q. (By Mr. Splawn): I see. On the date of the accident about what time did you go out into the field?

A. About 8:00 o'clock, possibly a little earlier; the children were out for apple picking, vacation, and it is possible we went to the field a little earlier.

Q. So it would have been around 8:00 o'clock, or it could have been earlier? A. Yes, sir.

Q. And the time of the accident I believe you stated, was what? A. About 11:00 o'clock.

Q. About 11:00 o'clock. Now, during that interval of time [192] were you picking apples?

A. Yes, sir.

Q. And had you picked on more than one tree?

A. Yes.

(Testimony of Rose Wong.)

Q. Incidentally, what did you put your apples into when you picked them from a tree?

A. A box.

Q. I see. And you carried the apples in a box in what manner?

A. Oh, I am sorry, I thought what you meant, what we put them into after we had picked them. I couldn't put an apple any place until it was picked, so I put it into a bag and subsequently put it into a box.

Q. I see. That morning, the morning of the accident, had you made various sets with your ladder? A. Yes, sir.

Q. About how many trees do you believe you had worked on that morning and up to the time of the accident? A. I don't know.

Q. I see, it was more than one?

A. It was more than one.

Q. The tree that you were working on when the accident occurred, how much of the tree had you gotten picked?

A. We had nearly finished it.

Q. Were you staying there to finish the tree or was someone [193] else staying there to finish the tree, or who was to finish the tree?

A. My daughter and I were picking on the same tree; we were to finish the tree, as far as our part was concerned.

Q. I see. Now, at the time of the accident your ladder was set with respect to this tree, of course, and engaged. Do you recall how it was set with

(Testimony of Rose Wong.)

respect to the tree itself; that is, pointed toward the tree or away from the tree, or if you recall, you may not.

A. The tongue of the ladder was toward the trunk of the tree.

Q. I see. And was it in any proximity to boxes of apples on the ground?

A. The boxes were adjacent to the trees that we were to put the apples in.

Q. That set, the one that you just referred to, how if you recall, if you do, do you remember placing your ladder?

A. Yes, I remember placing my ladder.

Q. You remember placing the ladder at that particular set? A. Yes, sir.

Q. And is your memory very precise about it, and you just remember all the details?

A. I remember placing my ladder.

Q. I see. And you placed it solidly? [194]

A. I did.

Q. And the tongue was centered?

A. It was.

Q. And you made sure that the ladder was placed solidly on the ground? A. Yes, sir.

Q. The way you did that was to place the tongue in the center; did you do that with your own hands?

A. I placed the ladder, I also tested the ladder on both sides.

Q. Yes, and when you placed the tongue, for example, did you do that with your hands?

(Testimony of Rose Wong.)

A. We have to use our hands to push out the tongue of the ladder.

Q. Then, to see that the ladder was solid, you tested it by putting weight on it?

A. Yes, sir, I also tested the tongue by looking, usually we go around the ladder and see that the tongue of the ladder was placed evenly and precisely.

Q. You went around the tongue of the ladder to see that that tongue was placed evenly and precisely? A. Yes, sir.

Q. In the center? A. Yes, sir.

Q. And that was the set? [195]

A. Yes, sir.

Q. The ladder was on level ground, was it?

A. Comparatively, with the terrain.

Q. And the ground itself was ground that had been disked? A. Yes, sir.

Q. It was ground, it wasn't a hard-surfaced ground, I take it?

A. Not too hard, no, sir.

Q. I mean, it had some softness to it by reason of what appeared to be disking?

A. Yes, sir.

Q. Now, where was your husband about that time, and I am speaking of immediately before the accident?

A. He was on the opposite row, across from us.

Q. Did anyone see you fall?

A. I don't know.

Q. I mean, you never learned of anyone?

(Testimony of Rose Wong.)

A. I don't know if anyone saw me fall or not.

Q. Do you happen to remember the variety of the tree; it isn't material, but I would like to know.

A. We were picking Delicious.

Q. Delicious at that time? Had you picked Jonathan apples earlier?

A. Earlier in the season, yes.

Q. Earlier in the season you had done the Johns? Now, it [196] is my understanding from your testimony on direct examination that you were up the ladder, I believe you stated the second rung from the top?

A. Yes, sir.

Q. Would that be including the top?

A. No, sir, we do not call that a rung.

Q. You do not call that a rung? You do not call the top a rung? If you did call it a rung or step, it would be the third step from the top, would it not?

A. If I called the platform, which we do not.

Q. Had you been reaching for some apples over to your left?

A. I had been picking apples to my left.

Q. I see. They were not immediately in front of you?

A. Not immediately.

Q. And, I take it that you were preparing to come down the ladder?

A. I was.

Q. You hadn't started down the ladder yet when you fell?

A. I had taken no step.

Q. You had taken no step? Now, were you leaning over to one side or to the other at that time that you fell or an instant before?

(Testimony of Rose Wong.)

A. I was not leaning to one side or the other, I had turned my body slightly to the right to bring my back away from the step so it would not hit the step. [197]

Q. So that the weight of your body was just as much centered as the tongue was centered in that ladder? A. That I do not know.

Q. Well, you were not leaning over to one side or the other?

A. Sir, when you say "leaning"?

Q. I mean stretching over beyond the sides of the ladder. A. No, I was not stretching.

Q. No, part of your body was extended over either side of the ladder, I take it?

A. I am sure I didn't measure; a ladder is very narrow at the top.

Q. Yes.

A. If I moved my body slightly to the right, my arm, no doubt, would extend beyond the ladder.

Q. But it wouldn't be any significant unbalance of your weight?

A. Sir, not of my body, no, sir.

Q. Now, were you impacting the ladder in any way, jerking it, shaking it, exerting any force on it, except just the dead weight of your body?

A. No, sir.

Q. So, all the force that was being exerted on that ladder at the time of the fall or an instant before was the static dead weight of your body?

A. No, sir, there was apples. [198]

(Testimony of Rose Wong.)

Q. And plus the apples?

A. And what weight would be exerted in my movement to turn from my left, slightly to my right, slightly.

Q. Well, were you lifting your feet off the rungs and changing the position of your feet?

A. No, sir.

Q. I see. So, the only possible shifting would be the turn of your body as you took the weight of the picking bag off the rungs?

A. Are you speaking of the shifting of my body?

Q. Yes.

A. It was the slight turn of my body, yes, sir.

Q. A slight turn? A. Yes, sir.

Q. But you were not stepping down?

A. No, sir.

Q. Both feet were on the same rung?

A. Yes, sir.

Q. And this turning was slight?

A. Not extreme, no, sir.

Q. And there was no impact or impacting, by that I mean shaking or jarring of the ladder, in that process, was there? A. No, sir.

Q. Then the next thing you became aware of, the ladder [199] tipped over on you?

A. Simultaneous with my slight movement to the right to bring the apple bag away from the step, I felt the ladder slightly twist and give under my feet, and it went, it just went out from under me.

Q. Well,—

(Testimony of Rose Wong.)

The Court: (Interposing) Just a moment, Mr. Splawn, let her finish.

Mr. Splawn: Pardon me.

A. (Continuing) I grabbed for the limb which was to my right. The ladder fell to the ground and I did.

Q. (By Mr. Splawn): The ladder fell completely to the ground? A. Yes, sir.

Q. Did the ladder go to the left?

A. Yes, sir.

Q. It went to the left? The apples which you, of course, before had been picking were to your left?

A. The apples were slightly to my left, yes, sir.

Q. Now, you mentioned an occasion between three and four weeks after your entry into the hospital when Mrs. Swier was there. A. Yes, sir.

Q. At the hospital.

A. Yes, sir, she visited me. [200]

Q. What is that?

A. She visited me at the hospital, yes, sir.

Q. Well, I direct your attention to an occasion to which you testified on direct examination that between three and four weeks after entering the hospital Mrs. Swier was there and visited you, and then you testified as to some remark or statement that Mrs. Swier made, do you remember the occasion now to which I am referring?

A. Yes, I do.

Q. Now, you have a very precise memory of that, I presume? A. I do.

(Testimony of Rose Wong.)

Q. And on that occasion or on that day were you suffering from any incompetency or inability to think or know what you were doing?

A. No, I was not incompetent.

Q. You were not incompetent? Your memory of what occurred, so far as the accident was concerned, was just as acute and as good then as it is today? Were you suffering from any lack of memory or inability to remember?

A. No, I suffered from no lack of memory. I have received medicines at various times, pain-killers.

Q. I am speaking now, directing your attention specifically, Mrs. Wong, to the occasion which you testified about on direct examination, that occasion being between three and four weeks after your entry into the hospital and it [201] was an occasion when Mrs. Swier happened to be there and made a statement, do you remember the occasion?

A. Yes, sir.

Q. Now, I now ask you on that date were you suffering from any lack of memory or suffering from anything that would cause you not to remember precisely and accurately what had happened to you in the accident? A. No, sir.

Q. Now, you mentioned on your direct examination that some gentleman had been there, had visited you at the time Mrs. Swier was there?

A. Yes, sir.

Q. And had taken some statement from you?

A. Yes, sir.

(Testimony of Rose Wong.)

Q. And you told him, I suppose, as best you could recollect at that time, what had happened to you in the fall, did you not?

A. I related some circumstances.

Q. I see. Do you remember signing a statement?

A. I signed it. [202]

* * * * *

Q. (By Mr. Splawn): Mrs. Wong, at the time of the accident did you hear any sound at the top of the ladder or anywhere else on the ladder?

A. No, sir.

Q. You say it gave away, I was wondering whether you heard any sound?

A. No, sir.

Q. I mean any creaking, or whatnot, to indicate any play or looseness?

A. I heard no sounds.

Q. You heard no sounds? Now, you mentioned on direct examination at the time of leaving the hospital you returned home. By that do you mean that you were actually maintaining a permanent home at that time on the Swier place?

A. No, sir.

Q. After you left the Swier place in April of the following year, I take it, I think I heard you say that, or maybe it was in the opening statement, April, 1956, when you left the Swier place, or could I be mistaken? [230]

A. It was in the spring, I can't tell you if it was April, but it was in the springtime.

Q. I see. And during that period of time you were occupying the tenant house on the Swier

(Testimony of Rose Wong.)

place? A. Up to that time, yes, sir.

Q. They were making no charge for that, were they? A. No, sir.

Q. Now, where did you go, did you say, when you left there?

A. I rented a house that was on North Cowiche Road.

Q. And you remained there until the spring of 1957? A. Fall of 1957.

Q. Fall of 1957? Well, then, had that become your permanent home? A. Oh, no, sir.

Q. Well, your husband was with you?

A. He was.

Q. Where was your home, if that wasn't your home?

A. I was paying for a home at that time in Boise, Idaho.

Q. Oh, I see. You were not occupying it?

A. Not at that time, no, sir.

Q. Nor your husband? A. No, sir.

Q. I see. You mentioned that one time, as I recall, you said in the forepart of January, 1956, Mr. Swier—correct me if I am mistaken—had sat down at the table [231] at your place and drawn a diagram?

A. Subsequent to his return, yes, sir.

Q. Do you have that piece of paper?

A. No, I don't.

Q. Didn't you save it? A. No, I did not.

Q. You have had several conversations with both Mr. and Mrs. Swier concerning the accident?

(Testimony of Rose Wong.)

A. Yes.

Q. And they inquired of you, did they not, as to what happened?

A. No, I cannot remember that they inquired of me of what happened.

Q. You don't remember them coming out to you either at the hospital or after you returned to their place from the hospital, and asking what had happened? A. No, sir.

Q. They showed no curiosity at all to find out from you what had happened?

A. I don't remember they asked me what happened.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Gavin): Mrs. Wong, when is it do I understand, that you first came here to the Yakima Valley? [232]

A. With regard to the accident and events surrounding it?

Q. Yes, where you remained for any length of time before it happened?

A. I came to the valley in June, 1955.

Q. Do I understand by that that you must have been here before, you and your husband, on other occasions in the past?

A. My husband had visited in the valley, not to reside, in 1945. I had resided in the same tenant house for three or four months to assist in religious work.

(Testimony of Rose Wong.)

Q. I see. Do I understand that you are a missionary as well as your husband, or just yourself?

A. Both of us.

Q. Both of you. Are you an ordained minister?

A. Yes, I am.

Q. I see, and your husband, too?

A. Yes, sir.

Q. I am not familiar with this; the reason I ask you, Mrs. Wong, do you have some church that employs you, the two of you?

A. Not at present, sir.

Q. Have you in the past been employed, you talk about a \$300 compensation.

A. We do not, we are not employed.

Q. I see. [233] A. As missionaries.

Q. Well, the thing I am curious about is that you say that there has been a loss of income of \$350 a month to you as a missionary. Now, where would you get that \$350, would somebody give it to you, or how does that work out?

A. We continually engaged in religious work, going from place to place, holding meetings at their invitation. We were given free-will offerings; we were also helped by our friends.

Q. I see. These sums of money that you believe you may lose by reason of your accident are contributions that are made at services which you and your husband might hold, is that what I understand?

A. Would you please state that question again?

Q. Well, do you travel from place to place,

(Testimony of Rose Wong.)

do you and your husband, do you hold meetings and services and you pass the plate and people contribute to you?

A. I don't pass the plate, no, sir. The plate is passed.

Q. The plate is passed and the money is in it?

A. Yes, sir.

Q. That is the source of the \$350?

A. Some of it, yes, sir.

Q. Well, is there some other source that you consider? A. Oh, yes. [234]

Q. What is that?

A. I have had many friends who are interested in our work over the years who continually contribute to our work.

The Court: May I ask a question just to clear it up in my mind: Were you on any regularly fixed salary from a missionary organization or a church organization? A. No, sir.

The Court: You were not? All right.

Q. (By Mr. Gavin): I see. Well, then, perhaps you can explain to us why is it that these people will no longer contribute to you and your husband because you have had this injury?

A. Did I state they no longer contributed to us?

Q. What?

A. Did I say they no longer contributed? At the present time we are not engaged in these meetings.

Q. Well, my understanding is, Mrs. Wong, I am sure that you will continue with your work?

(Testimony of Rose Wong.)

A. I am unable to do it.

Q. What? A. I am unable to carry on.

Q. And what is that that you are unable to carry on?

A. I am unable to, either by myself, to carry on religious work, or to assist my husband in interpreting.

Q. Is he capable of doing it? [235]

A. Not alone, sir.

Q. Would you mind giving me an example of the kind of work that you carried on, I really don't understand, Mrs. Wong, what it is that you did?

A. Evangelistic meetings, helping in various churches in various ways, such as teaching the Bible, teaching Sunday school.

Q. Have you done that kind of work out in the Cowiche area? A. Oh, yes, sir.

Q. I see. Do you continue with that kind of work now? A. I am not engaged in anything.

Q. Does Mr. Wong continue with it?

A. He is unable to.

Q. By reason of this accident?

A. I am unable to assist him.

Q. I see. What assistance does he need?

A. I am his interpreter.

Q. I see, and that requires you to interpret what he says? A. Yes, sir.

Q. Now, Mrs. Wong, when you came to the valley then in 1955 and before this accident occurred, is that the reason you and Mr. Wong came here, to do evangelistic and missionary work?

(Testimony of Rose Wong.)

A. When we came to the valley in 1955 we expected to stay several weeks to pick fruit to augment our income. [236]

Q. Then, did you have any plan or contract, or anything of that sort, to do work any other place?

A. Previous to that time, I did.

Q. I see. Well, what happened to that work?

A. That didn't work out.

Q. You mean, the contract which you had to do the work was what, was not completed?

A. Was not fulfilled by the other party.

Q. I see. Did you receive any payment from them on account of their failure to fulfill their contract? A. We received compensation.

Q. Covering what period of time?

A. No time was stated. Our contract was for two years.

Q. Two years from when?

A. From the fall of 1954 on.

Q. To the fall of 1956?

A. It would have covered that, yes, sir.

Q. Was it some church organization that employed you? A. Yes, it was.

Q. I see. And you say that when they didn't go through with the contract, did they make you some payments to cover the period from '54 to '56?

A. No, not immediately, sir.

Q. Did they, eventually?

A. Eventually they did. [237]

Q. Since you suggest that you would lose in-

(Testimony of Rose Wong.)

come of \$350 a month, Mrs. Wong, from the time of your injury, would you mind telling us how much income you did receive from that source from this church organization for the two years, in '54?

A. They contracted to pay Mr. Wong and I \$350 a month for our living expenses, plus adequate funds to cover the care of our three oldest children, who were then living with the Swiers.

Q. How much money did they pay you in satisfaction of that obligation?

A. I am not allowed to tell you, sir.

Q. Well, you were asking for \$350 a month from these people here, Mrs. Wong, from the time of your injury. Now, if you received some compensation from some other source that covers '54 to '56, that would serve to reduce that. I think it's only fair you tell us what it is.

A. No, sir, I didn't receive it for that period and I signed a statement not to disclose the amount of that settlement.

Q. Well, what period did you receive it for?

A. There was no period stated in the settlement, sir. [238]

* * * * *

Q. Your husband, you say, has done no work of any kind in the missionary field since your accident?

A. My husband has not done any missionary work since my accident. [240]

Q. Or any religious or evangelical work of any kind?

A. No, no traveling.

(Testimony of Rose Wong.)

Q. Has he done any locally?

A. He might have talked one or two occasions, but not as a steady thing.

Q. Is it your intention, Mrs. Wong; I am sorry if I don't keep my voice up, just tell me because I want you to hear what I ask you; do I understand that it is your intention because of this accident, now to abandon this missionary or religious work that you have done in the past?

A. I am forced by reason of disability to discontinue my work.

Q. You plan to make—you have no plans to resume it on any basis, limited or otherwise?

A. No, I don't at present, sir.

Q. Nor does your husband?

A. At present, no, sir.

Q. Now, I got the impression once in your testimony that you had only picked fruit for a few days before the accident happened, and in another part of your testimony that you had come up here in the early summer and had picked during most of the summer. Now, what is the situation?

A. No, sir, I didn't pick during the summer.

Q. How many days had you picked before your accident occurred?

A. I picked a week at pears, and we had been about a week on the apples when the accident occurred.

Q. I see. Do I then understand that your husband, however, had done work in addition to that in the fruit? A. Yes, he had.

(Testimony of Rose Wong.)

Q. Did he have a regular job with Mr. Swier?

A. No, sir.

Q. Well, did he work every day from the time he came here in 1955 until you were injured?

A. No, sir.

Q. What days did he work?

A. I can't tell you, sir, it was maybe one day, maybe five days; it was not regular work.

Q. What type of work did he do?

A. He picked cherries maybe six days. He painted a shed and he propped a few apples. I believe he thinned apples perhaps one or two days, as my memory gives it to me now.

Q. Is this in addition to that; did the two of you pursue your religious work in the Cowiche area, did you continue to do religious work besides your husband picking fruit and you picking fruit?

A. We were busy with Mr. and Mrs. Swier carrying on Sunday [242] school work. We were helping as much as we could in the Sunday school.

Q. Where did your compensation come from during that period?

A. From friends interested in us.

Q. Did the Swiers pay anything for the work that you did in the fruit or on their ranch?

A. When we were hired by the Swiers they paid us.

Q. I see. Now, that was the situation you were in and the way that you were earning your living, practically, if I may use that term, at the time that the accident occurred?

A. Yes, sir.

(Testimony of Rose Wong.)

Q. You had at that time, then, no contract of any kind to go out into the missionary field?

A. No, sir.

Q. Now, after the accident occurred, how long did you and your husband continue to live here at Cowiche?

A. Until the first of August, 1957.

Q. Then you moved to where?

A. Portland, Oregon.

Q. Now, is that where you now reside?

A. It is.

Q. Well, how long has it been since either you or Mr. Wong lived in Idaho, Mrs. Wong?

A. We left Idaho in the fall of 1955. [243]

Q. You were injured in the fall of 1955?

A. That is right.

Q. Well, how did you leave Idaho in the fall of '55?

A. Oh, I beg your pardon, the fall of '54.

Q. Fall of '54? A. I am sorry, sir.

Q. Where had you lived in Idaho?

A. Boise.

Q. Boise? Were you doing religious work there?

A. Yes, I was.

Q. And your husband? A. Yes, he was.

Q. Did you have any other source of income there other than religious work?

A. No, we did not.

Q. Were you affiliated with some church there?

A. Yes, I was.

(Testimony of Rose Wong.)

Q. What happened to that work in Idaho, why did you leave there?

A. We discontinued that place because we had accepted a contract with a new party in the religious work.

Q. And where did that involve you going to perform it? A. To the foreign field.

Q. To the foreign field? You then left Idaho in the fall of '54, and where did you go then? [244]

A. We went to Portland, Oregon.

Q. And then from Portland, Oregon, I take it, you came here in June of '55? A. Yes, sir.

Q. And remained here until August of '57, and returned to Portland? A. Yes, sir.

Q. Are you employed down there at all now, Mrs. Wong? A. No, I am not.

Q. Or your husband?

A. Yes, he is at present working part-time.

Q. I see. What is his employment now?

A. He works part-time at a cleaners.

Q. At a cleaning establishment?

A. Yes, sir.

Q. I see. Now, Mrs. Wong, when you fell or had your fall, I am personally not concerned how it happened, so don't worry about that part of it; I am concerned with what happened to you in the fall. How did you strike, what did your body strike, and what happened to you, do you mind telling me that?

A. I cannot tell you what my legs struck. It

(Testimony of Rose Wong.)

must have been a hard substance to shatter the bones in my leg, and after I had landed full length on my back, I put out my foot. I felt, well, numb to my hip, and put my [245] foot up and I saw the jagged bones sticking out through my sock.

Q. You, undoubtedly, fell on your left leg or ankle, did you not? A. I cannot tell you.

Q. You don't know what part of your body hit what at the time of the first injury?

A. I know my leg hit something; what, I don't know.

Q. Something hard? A. Yes, sir.

Q. Was there anything around under the ladder besides dirt or disked soil that you could have struck, Mrs. Wong, as you remember?

A. Not hard substance, sir.

Q. Boxes, for example?

A. Not in closeness.

Q. I see, or the ladder itself; perhaps you may have fallen on it?

A. I think that could have been possible, I don't know.

Q. You are conscious that your leg or ankle, the left one I am referring to, must have struck something that was hard?

A. Well, it was so simultaneous, sir, that as it struck it was numb clear to the hip. I had that instant sensation. [246]

Q. Now, you have shown us, Mrs. Wong, and the gentlemen here of the jury, a scar on the left side of your ankle, a long scar running up and

(Testimony of Rose Wong.)

down. Is that the point at which the bones compounded or went through the leg, finally?

A. What I showed the jury was half a leg, it couldn't be a point, but the point where the bones protruded was at this (indicating).

Q. Yes, you are pointing to the area of compression of the deepest part of your scar, is that right? A. Yes, sir.

Q. Now, you haven't expressed any, or given us any statement about any pain that you had at the time that you fell, but I presume you must have had some, didn't you?

A. I fainted; when I came to I felt extreme pain.

Q. And that extreme pain was felt where?

A. I was utterly ill with it all over, particularly, of course, in my leg.

Q. Have you had any medical training at all, Mrs. Wong? A. No, sir.

Q. Had you ever been in a hospital before this particular time you went to Memorial?

A. No, sir; that is, with the exception of the birth of my children.

Q. Yes, other than for childbirth you had not had any [247] injury or illness that confined you to a hospital? A. No, sir.

Q. Had you had any condition of illness or injury at all here in the Cowiche area from the time you arrived here in '55 until this accident happened, that would give you any knowledge of Dr.

(Testimony of Rose Wong.)

Zimmerman, for example, of who he was or where he practiced? A. No, sir.

Q. Did you even know his name at the time this accident occurred? A. No, sir, I did not.

Q. What about Dr. Lugar, did you know who he was? A. No, I did not.

Q. Or where he practiced?

A. No, I did not.

Q. Did you have, then, any prejudice or feeling against medical doctors at all, as such, Mrs. Wong?

A. Oh, no, sir.

Q. I don't gather that you objected in any way to Mrs. Swier calling Dr. Zimmerman to take care of you after you had had this fall, did you?

A. No, I did not object.

Q. Did you, when you fell and were in the orchard, did you retain or regain consciousness after you fainted? A. I regained consciousness.

Q. Were you aware of what was going on, or did you suffer from shock at all?

A. I was aware of what was going on.

Q. Do you know what I mean by shock, a feeling of coldness, illness, following a severe injury; did you have any feeling of that kind?

A. I felt pain and I felt an illness, but I was conscious.

Q. Do you know whether or not you were in a state of shock, however?

A. No (witness shakes head). I know that I was competent as I directed those around to make a splint for my leg. That is how I can measure

(Testimony of Rose Wong.)

that I was conscious enough to tell them how to make the splint.

Q. I see you directed someone to make a splint for you? A. Yes, sir.

Q. Who was that?

A. I believe Mr. Swier and the rest of the pickers had gathered round, and they were wondering at the time, they wanted to place me on a sofa, a lawn lounge, and of course, the leg was dangling and they knew that I couldn't be moved in that condition. I said, "Break the prop and slide it under and tie it above and below," which was done.

Q. I see. Someone took a tree prop?

A. Yes, sir. [249]

Q. Which is a, well, it's a board, isn't it?

A. Yes.

Q. And tied it onto your fractured leg above and below the bone?

A. Well, I know they tied it above and below the area, I cannot point to it.

Q. Do you remember, did you know that someone had called for a doctor?

A. Mrs. Swier told me she had called.

Q. But I mean were you aware that a doctor had been called as these things were going on in the orchard and the splint was being fixed?

A. She came out, I don't know at what juncture in the excitement, but she told me previous to the arriving of the ambulance.

Q. Now, do you remember any nurse coming

(Testimony of Rose Wong.)

there and giving you any care or assistance before the ambulance arrived?

A. The nurse came but she couldn't give me any assistance.

Q. I see. Did she give you any medication or drugs or pain relievers, or anything of that sort, at the time you were there and before you went in the ambulance?

A. She had in her hand a syringe and I asked her, "Is that demerol?" She said, "Yes." I said, "I am allergic to demerol," so she did not give me the injection.

Q. I see. You had had demerol before, then, I take it? [250]

A. Yes, I had.

Q. I see. Now, did the ambulance attendants give you any kind of medication?

A. No, sir.

Q. Drugs, or anything of that sort?

A. No, sir.

Q. About what time of day would you say it was, Mrs. Wong, that you sustained this fall?

A. About eleven o'clock in the morning.

Q. And do you remember about what time it was you reached the hospital?

A. In my judgment it was between twelve and one.

Q. Between twelve and one? And an hour to two hours after you had sustained the fall?

A. The ambulance didn't arrive until quite a good deal of time had elapsed.

Q. Well, your best recollection would be that it was between an hour to two hours after you fell

(Testimony of Rose Wong.)

before you were physically delivered to Valley Memorial Hospital? A. Yes.

Q. Had you ever been in this hospital?

A. No.

Q. Or have any knowledge about it or know of the people there? Did you have any knowledge about it or know of the people or nurses who treated people in Memorial [251] Hospital?

A. No, I was not acquainted with the nurses or any of the people.

Q. I take it you made no objection to being taken to this hospital for treatment?

A. No, sir.

Q. Well, where were you taken to when you first arrived there with the ambulance attendants?

A. Emergency.

Q. Do you remember where that is in the hospital, for example, as compared to where you later were in rooms or in surgeries?

A. No, sir, I could not tell you.

Q. I see. By this time were you still in a state of serious pain, were you?

A. It was painful, yes, sir.

Q. Severely painful?

A. It was a severe pain, yes, sir.

Q. Were you given any sedation, any drugs, any injections of any kind when you got to the hospital and were in emergency?

A. I arrived in the emergency and I remember expressing again, "Please don't give me demerol."

Q. That was expressed to whom?

(Testimony of Rose Wong.)

A. The nurse and attendants. [252]

Q. I see.

A. Subsequently she gave me a shot of morphine.

Q. How do you know it was morphine?

A. The orderly stood on one side, the nurse on the other. The nurse said, "Shall I give her morphine?" The orderly says, "Well, if you had a broken leg, what would you do?" And she gave me the shot.

Q. This is in emergency? A. That is right.

Q. I am curious about this person you describe as an orderly. Why do you say it was an orderly?

A. Well, he was of the male gender.

Q. I see. Do you understand what an orderly is at a hospital, what he does?

A. I am not acquainted altogether with his work, no, sir.

Q. I see. There was some man there?

A. He had on a uniform, sir.

Q. A white uniform?

A. I cannot tell you the color of it.

Q. This is a different place, however, than the surgical room to which you were later taken?

A. Yes, sir.

Q. And these would be different people, would they, than were in the surgery, this orderly and this nurse?

A. I cannot tell you what nurses wheeled me to surgery [253] because they stand behind your head, you don't get a view of their face.

Q. You were on a table of some kind?

(Testimony of Rose Wong.)

A. I was put on a stretcher after they took X-rays, yes, sir.

Q. Laying on your back? A. Yes.

Q. Now, were you taken to some place to have X-rays taken? A. No, sir.

Q. And where were the X-rays taken?

A. In emergency.

Q. And in this same emergency place?

A. Yes, sir.

Q. Do you remember who took those, was it men or women? A. I can't tell you.

Q. You just know they were taken?

A. Yes, sir.

Q. Did the morphine have any effect on you, do you believe, that you were given?

A. I don't know, sir.

Q. I see. Do you know how long it was that you were in this emergency, Mrs. Wong?

A. No, sir, I don't know how long.

Q. Do you know when it was that you reached the surgery?

A. As soon as they finished the X-rays they put me on the [254] stretcher and took me immediately.

Q. You were lying on your back and being pushed on a cart?

A. Yes, a long cart, stretcher.

Q. Had anybody removed this splint at that time? A. No, sir.

Q. Had anyone examined your wound?

A. No, sir.

(Testimony of Rose Wong.)

Q. You were taken to some other place in the hospital, however, on this cart?

A. Surgery.

Q. Yes, and you recognized it as a surgery, did you, when you went in? A. Yes, sir.

Q. Now, how were the people dressed in the surgery, do you remember that, men and women?

A. They had caps. I can't tell you the cut of their uniforms. I was aware it was not ordinary dress.

Q. I see. You were aware of something about their dress that indicated this was a surgery you were going to?

A. No, sir, I saw the above apparatus. I was placed on the table for surgery.

Q. Did these men and women who were in this surgical room wear masks, for example, over their mouths?

A. My memory is quite clear that some of them did, yes.

Q. And they wore tight-fitting caps on their heads? [255]

A. Well, they are small hats that fit down over the head in this fashion, sort of square-like (indicating).

Q. Did you understand when you went there, from some source, that some surgical procedure was going to be performed on you?

A. I understood that I would be attended to medically.

(Testimony of Rose Wong.)

Q. I see. Now, were you in a state of shock at that time?

A. I was not in shock to the extent that I did not understand what was being said to me and what was being done to me.

Q. How many people were there in the surgery, do you know? A. No, sir.

Q. Up to this time, Mrs. Wong, you had, as far as you know, never laid eyes on Dr. Zimmerman, had you? A. No, sir.

Q. You didn't know whether he was a tall man or a short man or a young man or an old man, did you? A. No, sir.

Q. Now, when do you think it was, or do you say it was, that you first ever saw Dr. Zimmerman in connection with this case?

A. In surgery that day.

Q. And you say this because some man, as you told us just this morning, stood by your head, is that right?

A. No, sir, he introduced himself as Dr. Zimmerman. [256]

Q. And he said what to you?

A. He said, "I am Dr. Zimmerman."

Q. What else did he say?

A. He asked me if I was in good health.

Q. Did he ask you whether you were dizzy or had ever been dizzy? A. Yes, sir.

Q. Did he ask you whether you had ever had heart trouble? A. Yes, sir.

Q. You replied "No," to all this?

(Testimony of Rose Wong.)

A. Yes, sir.

Q. And then what was done to you?

A. Then they stripped the upper part of my body and told me they were giving me a spinal injection, and they turned my body on this side (indicating) and told me to put my knees, draw my knees up in my arms in order to get in position, and they pushed with some pressure on my body. I felt the needle go in my back bone and it felt to me as though they were feeling for the proper place; it was painful. Then, all of a sudden I felt like fire reaching my limbs, and I was not immediately turned back on my back, but there was a space of just a few minutes, then I was turned back on my back.

Q. Which one of the people was it there that gave you that spinal? [257]

A. I cannot call him by name.

Q. Then there were two men there, you say, was it a man or a woman?

A. I do not know who gave the spinal injection.

Q. Do you know how many, whether it was a man or a lady that gave you the spinal injection?

A. I heard a man's voice.

Q. Was the man who identified himself as Dr. Zimmerman wearing a mask and one of these caps, too, wearing any kind of a uniform?

A. No, sir.

Q. Just in street clothes?

A. I can't give you a description of his clothes.

Q. Well, now, when your deposition was taken,

(Testimony of Rose Wong.)

Mrs. Wong, didn't you tell me that you assumed that this man was Dr. Zimmerman, that you were in a state of shock and you assumed that is who it was that came and stood by you?

A. It's possible the deposition reads that way, but I have considered it in my mind and I remember distinctly of Dr. Zimmerman introducing himself.

Q. You didn't tell me that when your deposition was taken, though, did you, back on March 15 of 1957?

A. I have not reread the deposition.

Q. Well, it says it was taken at 2:30 o'clock p.m., Friday, [258] March 15, 1957, in Mr. Splawn's office.

A. Yes, I remember the occasion.

Q. Do you remember being there?

A. Yes, sir.

Q. I examined you like I am now?

A. Yes, sir, I remember you.

Q. You were under oath at the time?

A. Yes, sir.

Q. And did you not testify as follows; I am reading from page seven, counsel, of the deposition:

"Q. Did he identify himself as Dr. Zimmerman when you first saw him in the operating room?"

"A. I cannot tell you whether he introduced himself or not.

"Q. I take it you gathered or knew it was Dr. Zimmerman who was there to see you?"

"A. In a state of shock I assumed that is who it was."

(Testimony of Rose Wong.)

Q. (By Mr. Gavin): Now, did you so testify, Mrs. Wong?

A. If it is written there, I so testified.

Q. Well, is your recollection of these events occurring after this severe injury October 17, 1955, better today in court than it was a year ago?

A. I think it's possible, we recall to mind after considerable [259] thought many incidents that we don't at particular times.

Q. Do you feel, really, Mrs. Wong, that as you lay in surgery having received a shot of morphine, having this severe pain that you told us about after this injury, never having ever been in a surgery of this type before, that you really have a sure recollection of who it was that was there and that you talked to first was a doctor? A. Yes, I do.

Q. And that recollection has come upon you recently, apparently?

A. I wouldn't say this moment or this week, but I know I saw Dr. Zimmerman's face.

Q. When was it that you first remember, Mrs. Wong, in connection with being here today in this lawsuit against Dr. Zimmerman, that it was Dr. Zimmerman who was there when you first went into surgery; when was it you first remembered that?

A. I beg your pardon; would you repeat yourself?

Q. That is right, that is not a good question. I talk too much and it can't be a good question. Put it this way: when was it that you first remember

(Testimony of Rose Wong.)

that Dr. Zimmerman had introduced himself to you at the surgery?

A. Dr. Zimmerman stood slightly back of me on this side [260] (indicating).

The Court: I think you misunderstood the question, Mrs. Wong. He is asking you when you first recalled that?

Mr. Gavin: No, she has testified, your Honor, that Dr. Zimmerman introduced himself and said, "I am Dr. Zimmerman."

Q. Now, when was it, today is the 25th of March, I guess it is; how recently was it that you remembered that Dr. Zimmerman introduced himself to you in the surgery, when you were first wheeled in there?

A. I cannot give you a specific date, but I know I have been very much aware of that for some time.

Q. You were not aware of it in March of 1957, however?

A. When that question came to me I didn't at that time recall it, but I have since, and it is very clear.

Q. Have you talked to anybody who has refreshed your recollection about this?

A. No, sir.

Q. Have you talked to anybody about it ahead of coming here to testify about whether he introduced himself to you or not?

A. I have talked to my attorney, sir.

Q. Did your attorney tell you anything that

(Testimony of Rose Wong.)

would have refreshed your memory as to whether he introduced himself or not? [261]

A. My attorneys told me to tell the truth.

Q. Yes, but did you talk about whether Dr. Zimmerman had introduced himself to you?

A. We discussed this matter.

Q. I see. Did you discuss the testimony that had been given in your deposition back in '57?

A. No, sir.

Q. Now, Mrs. Wong, were you conscious or aware of anyone engaging in the cleaning of your wound at the time you were in that surgery?

A. No, sir.

Q. Then, if the wound was cleaned in the surgery, it must have been done after you were rendered unconscious by the anesthetic?

A. Yes, sir.

Q. Now, no doctor that you remember undertook to examine or deal with the actual point of wound itself before you became unconscious?

A. No, sir.

Q. I see. Now, from the time that you were wheeled into the surgery until the time you became unconscious, do you have any idea of how much time elapsed?

A. I shall reiterate your question and see if I understood it properly.

Q. Yes, that is fine. [262]

A. You asked me how long a time elapsed between the time I was wheeled into surgery until I became unconscious?

(Testimony of Rose Wong.)

Q. You counted one, two, three, four, and went to sleep?

A. They had given me the spinal, and as I related, had taken the pins out of my hair. They had taken and unclothed the upper part of my body and replaced it with a white gown. They had waited a little space of time before turning me back on my back. Then I was told—and had my arm placed in position for an injection in the arm—and told to count, and I remember I counted to forty-two and became unconscious.

Q. Well, that doesn't quite answer my question.

A. I can't tell you in minutes.

Q. How long?

A. Well, to count forty-two slowly would be forty-two seconds.

Q. Well, would you have been in there as much as, say, ten minutes from the time you were wheeled in until you were out, or five minutes, or an hour, or what would you say?

A. Oh, no, not an hour. I think the time could be relatively close if set between seven to ten minutes, someplace along that region.

Q. Now, after you had regained consciousness I assume you must have been back in some room in the hospital, were [263] you not?

A. Yes, sir.

Q. You were not in surgery? A. No, sir.

Q. And when is the first time that you saw Dr. Zimmerman after that time?

A. Doctor Zimmerman came to visit me.

(Testimony of Rose Wong.)

Q. That same day?

A. No, sir, I don't think so.

Q. The next day?

A. Yes, sir, I think it was the next day.

Q. Did he come and visit you, as I understand you, every day? [264]

* * * * *

DR. MAX MARK BOCEK

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Max Mark Bocek.

Q. And where do you reside?

A. Yakima, Washington.

Q. And what is your occupation?

A. I am a physician and surgeon.

Q. Where do you maintain your office?

A. It's 307 S. 12th Avenue, Yakima.

Q. Doctor, I wonder if you would give us your educational background?

A. I received my medical degree from the University of Oregon Medical School. I interned there for one year. Following that I had four years of orthopedic surgery training at the University of Oregon Medical School.

Q. Since that, now, when did you enter the active practice of orthopedic surgery?

A. I started practice in July of 1955. [265]

Q. Here in Yakima?

(Testimony of Dr. Max Mark Bocek.)

A. In Yakima, yes, sir.

Q. And you have since been so engaged?

A. Yes, sir.

Q. Now, are you a member of any of the either local or national societies?

A. A member of the Yakima County Medical Society, the State Society, and also the American Medical Society.

Q. Are you acquainted with the plaintiff in this action, Rose Wong? A. I am.

Q. Can you tell me when you first saw Mrs. Wong?

A. Yes, I first saw her on, let's see, November 20, 1956.

Q. And what was the cause or occasion of her visiting you, Doctor?

A. She was sent to me because of two areas of slight drainage on the left ankle.

Q. What condition did you find the left ankle to be in?

A. Well, to inspection the ankle had a fairly normal appearance as far as alignment was concerned. There were two scars on the ankle, one lateral and one medial. The ankle was fixed in a slight equinus, which is a slight pointed-down position. The range of motion of the ankle joint was about, oh, five degrees or less. There were two small punctate areas in the middle of [266] these two scars I mentioned on the outside and the inside of the ankle from which there was extruding a very small

(Testimony of Dr. Max Mark Bocek.)

amount of very thick pus. With pressure, you could bring it out.

Q. Now, did you ascertain what had brought about this condition, Doctor?

A. Well, by the history that she told me, in 1955 in the fall, that I think was October, as I remember, that she had fallen and sustained a compound comminuted fracture, from her description is what it sounded to be.

Q. Did she advise you that the situation of gas gangrene had developed?

A. Yes, she mentioned it had been some problem there; that it did have, apparently, gas gangrene, however, at this time there wasn't any traces of any such.

Q. Yes; now, what treatment did you give the leg, Doctor?

A. Well, on two occasions we admitted her to the hospital and curetted out the sinus tract, these little openings, to go down at the edge to see if we could find the affected bone and, if so, remove it by scraping; and this was done on the first occasion in May of 1957—now, excuse me, the first occasion in December of 1956, and then the second occasion was May of 1957.

Q. Now, during that period of time that you were treating Mrs. Wong was there continual drainage of the leg? [267]

A. Yes, she had continual drainage until one of the later visits she had finally stopped, but during this episode the two hospitalizations, especially,

(Testimony of Dr. Max Mark Bocek.)

there was some continued drainage of the small amount that was there.

Q. The wound has recently become healed completely over?

A. Yes, recently I rechecked; it's completely healed.

Q. Now, what effect, Doctor, has this injury had upon the use of the left leg or foot?

A. Well, due to the joint injury because of the fracture she has sustained, it has resulted in a stiff ankle on this left side, in a slightly toe-down position, and because of the injury to the joint she shows signs of developing what they call a traumatic arthritis, a breakdown in the joint.

Q. Now, is there at the present time, Doctor, any presence of osteomyelitis?

A. On the last recheck there wasn't any clinical signs at all of any sustaining.

Q. But there had been previously?

A. There had been previously.

Q. Now, from the standpoint of time, Doctor, how long after there is apparently no O.M. will it be before a medical man such as yourself can say that there is no danger of an outbreak?

A. Well, you can never say for sure that it would never [268] come back.

Q. Is there an accepted theoretical space of time in which you feel that there has been complete retardation?

A. Well, I should say if you could follow the ankle for a period of a year and a half and two

(Testimony of Dr. Max Mark Bocek.)

years and there had been no drainage, that you could be reasonably sure that it was healed, but even so——

Q. (Interposing): Even so, you would not say that there was no chance for it to recur?

A. No, I wouldn't.

Q. Is it possible, Doctor, in injuries such as this that O.M. might break out in some other portion of the body rather than right at the point of the injury?

Mr. Gavin: I object to the form of the question. We are not concerned with possibilities, your Honor, but only with reasonable medical probabilities.

The Court: I think I will sustain the objection.

Mr. Gavin: Not whether it is possible.

Q. (By Mr. Hudson): Is there a probability that osteomyelitis might appear, disclose itself in some portion of the body other than the point of injury? A. I wouldn't think so.

Q. Do you think it would be confined to the injured area?

A. Most of them are to the injured bone.

Q. Do they ever break out elsewhere, Doctor?

A. I object to the question, your Honor.

The Court: Well, I will sustain the objection on that.

Mr. Hudson: I didn't get the Court's ruling.

The Court: I will sustain the objection.

Q. (By Mr. Hudson): Now, you have some X-rays, recent X-rays of this lady?

(Testimony of Dr. Max Mark Bocek.)

A. I have, yes (witness produces X-rays).

The Court: Would you like to have the view box set up here?

Mr. Hudson: Yes, sir.

Mr. Gavin: It's right here, your Honor.

The Court: Oh, I see; I didn't see it.

Clerk of the Court: Marking this Plaintiff's 18.

(Whereupon, Plaintiff's Exhibit No. 18 was marked for identification.)

Q. (By Mr. Hudson): I hand you an X-ray negative which has been marked for the purposes of identification as Plaintiff's Exhibit 18, Doctor, and ask you if you will tell me what that is (hands photograph to witness)?

A. This is a view taken of three projections of the left ankle.

Mr. Hudson: I am going to offer it.

Mr. Gavin: I have no objection. This is an X-ray that the Doctor himself has taken? [270]

Mr. Hudson: Has taken.

Mr. Gavin: Yes.

The Court: It will be admitted then.

(Whereupon, said X-ray was admitted in evidence as Plaintiff's Exhibit No. 18.)

Q. (By Mr. Hudson): Would you be good enough to place it in this viewer, Doctor, and explain the joint situation to the jury?

A. (Witness places X-ray in view box): This is taken with three views of this left ankle, showing here the tibia, the large bone of the lower leg, the fibula, the small bone, the astragalus or scaphoid

(Testimony of Dr. Max Mark Bocek.)

area. It's the true ankle bone itself; it is just the name for it. As you look at the X-ray, you will notice that the tibia has straight alignment, it shows no shift, but it does show here deformity (indicating). There is a rounded mass here evidenced. There is a marking in here evidenced that is not usual (indicating). There is cross-union between the small bone and the large bone here (indicating). There is apparent fracture with a little minor displacement of the fibula here (indicating). It looks well healed, though, it shows continuity. Now, as far as the ankle joint itself, there is no space discernible in this area where the ankle joint actually lies. Normally you see a little bit of a space, more, [271] it would appear here, of a dark nature; it would outline this ankle bone itself, separating it from the lower tibia. In other words, there is narrowing of the joint; there is a loss of the normal cartilage that would support the bony parts, and we refer to those as degenerative processes taking place in the joint. The cartilage that normally separates the bone and leaves a little gap in the parts of the joint is absent. This second view shows the ankle, this was straight forward, this is with a 45 degree angle to the plate, and it just shows again the same changes as you see on this first view here, the straight AP view. Again you see the rounded mass where it must have been a comminuted fragment, and it is healed in; and another one here, that is by these markings here (indicating), and there is a well-healed fracture running down through in this

(Testimony of Dr. Max Mark Bocek.)

area here; you can see a little remnant of the little gapping. And this last view is a side view of the ankle taken with the ankle straight sideways, and it shows normal alignment between the ankle bone, the astragalus, this little bone here, and the heel bone down at the bottom here, and the tibia. However, this was put in proper position; however, it again shows lack of joint space. There is practically no gap between the large ankle bone and the tibia. You can see a [272] little gap here (indicating) showing that there is a cartilage lining the joint. Here, too, you can see a rarification in this area, another small one up here where some of these curettements have taken place, some loss of bony material there because it was infected and had to be removed to clear the infection.

Q. That was removed in one of your operations?

A. In one of them, yes, they were right in the same area.

Mr. Hudson: Would you just resume the chair, please, Doctor?

(Witness resumes the stand.)

Q. (By Mr. Hudson): What is your prognosis, Doctor, upon this injury?

A. Well, any joint that has been badly injured, as this one has, has usually developed a traumatic arthritis, a painful joint that remains. So, until further treatment is given, for instance, this joint will probably need an eventual fusion, eventual obliteration of the joint, so you would have fusion.

Q. By "fusion" what do you mean, Doctor?

(Testimony of Dr. Max Mark Bocek.)

A. That means that the joint that is still remaining, although it is narrowed, there is still a little motion, enough to cause pain. We go in and scrape that joint out completely so that the bone fragments will pass across so that it is healed solid and there is no motion [273] whatsoever. That is called fusion. If the joint is painful, so that they don't move, so that there is no motion present, then there is no pain.

Q. Even after the fusion, that will still present the possibility or probability of an arthritic condition?

A. No, that is why you do the fusion, to stop the process.

Q. So that will not be present?

A. That is right, you obliterate the joint.

Q. Is there any possibility, Doctor, of returning that ankle to its normal function?

A. Yes, if you have a successful fusion the ankle becomes painless and they are able to get along very well, with some limitations, of course, by lack of motion; but for ordinary walking on smooth surfaces, they get along very well.

Q. When or how long before such an operation could be contemplated, Doctor?

A. Well, in the presence of drainage you can't do it. Now that she is healed I would like to give her a period of 18 months to two years before we would tackle any surgery of that kind, if I were going to do it.

(Testimony of Dr. Max Mark Bocek.)

Q. In the event that osteomyelitis continues, what is the prognosis, then, on the limb?

Mr. Gavin: I will object to that, your Honor, because he hasn't established with any probability that it [274] will continue. I understood the Doctor to say that it is absent, it no longer exists.

The Court: I think he should be permitted to state the alternative of the repair by fusion. I will overrule the objection. You testified that it couldn't be done if the osteomyelitis came back?

A. It would be more likely to be doomed to failure than it is at present.

The Court: I see. All right, go ahead.

Q. (By Mr. Hudson): In the event the osteomyelitis were to recur, then what is to be done with the limb?

Mr. Gavin: I understand that you overruled my objection. My point is, of course, that when he says that "in the event that it recurs" that he has not established with any probability that it will recur, you see.

Mr. Hudson: I don't believe that is quite correct. I think that the Doctor has testified that you never know that it will not recur, but if it does not recur in the period of two years, you feel comparatively safe.

The Court: I understood his testimony to be that if it doesn't recur within a year and a half or a year or so that it is then reasonably probable but not altogether certain it won't recur.

Mr. Hudson: Yes, sir.

(Testimony of Dr. Max Mark Boeck.)

The Court: I will overrule the objection. [275]

Mr. Splawn: May I interpose the same objection on behalf of my clients and on the theory that there has been no testimony of the probability of osteomyelitis in any degree of reasonable medical certainty, in view of the Doctor's own testimony.

The Court: All right, overruled. You may proceed.

Q. (By Mr. Hudson): Do you recall the question, Doctor? A. No, I am afraid I don't.

Q. In the event osteomyelitis should recur in the limb within the next eighteen months to two years, then what has to be done with the limb?

A. Well, of course, you are thrown back to your original problem. You have to again go in and attempt to clean it out and obtain healing with the delay necessary.

Q. Now, if the osteomyelitis cannot be controlled by those methods, what is the eventual answer?

A. Well, it depends; some people go along all through life with a few draining sinuses and get along fairly well; others find it so incapacitating and with the recurrence of pain that they ask for amputation sometimes.

Q. There is no particular danger of complication in an amputation under those conditions?

A. Not usually.

Q. Doctor, referring to this particular area, when a [276] person sustains a compound comminuted fracture of an ankle caused by a fall in a fruit orchard in the Yakima Valley, do the methods

(Testimony of Dr. Max Mark Bocek.)

recognized and approved by those reasonably skilled in the medical profession in this community require the administration of a tetanus antitoxin shot?

The Court: Wait a minute before you answer that. [277]

* * * * *

The Court: Well, proceed. You ask him first, if he has an opinion, or he feels that he can express an opinion.

Q. (By Mr. Hudson): Doctor, do you have an opinion or do you feel that you can express an opinion of the requirements, or the recognized methods of individuals or professional men reasonably skilled in the medical profession in a circumstance such as this in the fall of 1955?

A. You mean for this community, or others, or where?

Q. Sir?

A. You mean, for this community, or for where I was trained? [278]

Q. In the Yakima Valley here?

A. I don't know whether I could give an opinion for the Fall of '55. I hadn't been here long enough to know what was the exact treatment they gave.

Q. I didn't understand you, Doctor?

A. I don't know whether I could give an opinion for the Fall of '55, because I had only been here two months or three months, because I didn't know what standard they had at that time, that is, among the general men; I just know my own standards, what I would do in regard to that sort of problem.

(Testimony of Dr. Max Mark Boeck.)

Q. Well, can you express your opinion as to your own standard, as to what you would require?

Mr. Gavin: I object to that.

Mr. Splawn: I would object to that, also.

The Court: I will sustain the objection.

Mr. Hudson: Pardon me, just a moment.

The Court: Yes, all right.

Mr. Hudson: You may examine.

Cross Examination

Q. (By Mr. Splawn): Did I not understand you, Doctor, to state in answer to counsel's question concerning the probability, looking at it at this juncture, of osteomyelitis developing [279] at the site of the fracture, what was your testimony in that regard? I may have misunderstood you, I thought you said that you could not say that it would develop, with any degree of medical certainty, or that it was not probable; that it was possible but not probable, am I mistaken in my impression of your testimony?

A. No, I think what I meant to say, I don't know how you got it, but it is quite probable to a certain percentage that certain ones will recur.

Q. Yes.

A. If there has ever been osteo, and it might recur a number of years later, as far as that goes.

Q. Well, I am not speaking of individual cases, but I am speaking of the balance of probabilities in all cases.

The Court: Of development or recurrence?

(Testimony of Dr. Max Mark Bocek.)

Mr. Splawn: Of the recurrence or development of osteomyelitis, coming again.

The Court: Is there a difference between development and recurrence, Doctor?

A. Yes.

The Court: I just wanted to make it clear what he is talking about.

Mr. Splawn: Thank you.

Q. What is your opinion along those lines?

A. Of recurrence? [280]

Q. Yes.

A. Well, they can recur and they do recur a lot of times, it's quite common, in fact.

Q. I see. What about the development of osteomyelitis at any other place in the body?

A. I wouldn't think that would be very probable.

Q. I see. A. It's possible, of course.

Q. Yes. When is it that you recommend fusion?

A. Oh, I would like to see the joint left alone the way it is, perfectly well-healed, for about two years.

Q. I see. Is there any indication in any way to indicate that osteomyelitis might recur?

A. I don't think I can answer that.

Q. I see. There is no signs of it, now?

A. No, there is no signs of either presence or absence.

Q. I see. It is not draining or the drainage is completely healed?

A. All I could see is the skin.

Q. I see. So far as the patient's symptoms are

(Testimony of Dr. Max Mark Boeck.)

concerned, if there are any symptoms relative to that condition, have there been any expressed recently? A. Because of the osteo?

Q. Yes.

A. Or because of the injury? Well, the only symptom of [281] osteo would be drainage and fever. She has had none of that.

Q. Drainage and fever is typical of osteomyelitis?

A. Of course, you can have chronic osteo with no fever but drainage.

Q. I take it at the present time there is no drainage? A. Not the last time I saw her.

Q. I see. Well, you used the term "completely healed," you are referring to the drainage, I suppose, in that?

A. Absolute signs of drainage, that is right.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Gavin): Are you through?

Mr. Splawn: Yes.

Q. (By Mr. Gavin): Doctor, everybody else seems to understand osteomyelitis, I am not sure that I do. What is osteomyelitis?

A. Well, pure and simple, it's infection in a bone.

Q. A bone infection? A. A bone infection.

Q. I see, and when this lady came to you for the first time, she had some infection present in this fracture site in her ankle where she had been hurt?

(Testimony of Dr. Max Mark Bocek.)

A. She did. [282]

Q. And your purpose, of course, was to remove that infection, if possible, before you did any further work upon it, is that right?

A. That is right.

Q. I take it that at least as we sit here today, you have been successful up to this point, the infection has now gone away and the area has healed?

A. It apparently has, yes.

Q. It may or may not drain again in the future?

A. That is right.

Q. That is something that lies in the future, I take it, whether it is going to recur or is not going to recur? A. One doesn't know.

Q. Well, the gentlemen of the jury are sitting here with the problem before them. Do you care to state whether, in your opinion, for their help, it is possible that this osteomyelitis will come back again or whether it is probable that she will get along for eighteen months or two years and it is gone?

A. Well, from past experience in seeing this type of case, I would say it's about a fifty-fifty chance of going either way.

Q. Oh, I see. You would be in the realm of guesswork, then, whether it is going to occur or is not going to occur? [283]

A. Unfortunately, I don't have a crystal ball.

Q. What?

A. Unfortunately, I can't foretell the future.

Q. It is my understanding if it is not going to

(Testimony of Dr. Max Mark Bocek.)

recur, then what should be done for this lady is to perform a fusion of the ankle joint?

A. Yes, I think it's indicated.

Mr. Gavin: The only reason that I am moving up here is that I didn't hear the Doctor too well.

The Court: I think it might be well for you to speak up a little more, Doctor. I think the jurors in the back are going to have a hard time hearing you. The acoustics are bad in this room.

Mr. Gavin: I think when he talks to me over there his voice goes out in this direction, so I will stand over here.

Q. You feel, then, that the thing to do for her, assuming no recurrence of this bone infection, would be to fuse or make solid this joint that has narrowed in the ankle? A. Yes, I do.

Q. And if that procedure is successful, Doctor, she should then have a pain-free foot?

A. Yes. If you have a good result, it's pain-free.

Q. We have heard Mrs. Wong here today, she complains that the foot is a painful foot. What your surgery or [284] procedure would seek to do is to remove that pain? A. That is correct.

Q. And assuming that this treatment of yours were a successful one, Doctor, do I understand then that she would be able to perform all of the normal functions, in the sense of being able to walk and use the foot, that assuming there is a limitation of motion, of course, that she has been able to do in the past?

(Testimony of Dr. Max Mark Bocek.)

A. They are usually able to walk quite well on smooth surfaces.

Q. She tells us that she is a lady who, in addition to being a housewife, has a profession in the ministry, she does religious work and, particularly, interprets for her husband from Chinese into English, I assume, going to various religious meetings, that is the type of work she has done. This procedure, if your course of treatment proves to be successful, is there any reason why she shouldn't continue on and do that work?

A. Coming out as we desire, if the outcome would be as we would want, a good result, why yes.

Q. Well, Doctor, again, do you care to give this jury the benefit of an opinion, and that is all they are going to have to go on, do you believe there is a reasonable probability that your treatment of this lady will be successful in the sense I just asked you about? [285]

A. Well, relating it to general experience that I have had, ankle fusions, about 60% are good results.

Q. Of the kind we talk about?

A. Ankle fusions, yes.

Mr. Hudson: I didn't hear the percentage?

The Court: About 60% are good, is that what you said?

A. Yes.

Q. (By Mr. Gavin): Well, are you able to help us in this case, Doctor, or these gentlemen, by projecting your opinion as to whether it is reasonably

(Testimony of Dr. Max Mark Boeck.)

probable that your course of treatment on this lady should prove to be successful?

A. You can't predict, really.

Q. You are unable to predict?

A. Because there are so many variables that come up in any treatment of that nature.

Q. At least, as of this time, with the infection gone away, you hope to follow out this course of treatment, do you not, Doctor?

A. That is our ultimate aim in the treatment, yes.

Q. Now, Doctor, this ankle that you see here, and as you show in your picture, Exhibit 18, is an ankle that has sustained a comminuted compound fracture, is that correct? [286] A. Yes.

Q. You not only see that from your X-rays, but you obtained a history of that sort of an injury, did you not? A. Yes.

Q. Is it a usual or uncommon thing, Doctor, in a compound comminuted fracture of the type this lady had, as she described it to you and as you see the evidences of it in your pictures, to find the development of some areas of drainage of the type you saw at the time you did?

A. Well, it is not unusual.

Q. Doctor, considering the nature of the injury, the area of injury in the ankle, a compound comminuted, the extent of it that you can detect from this picture and the history received of it, would you venture an opinion for us as to whether this lady, considering the nature of the injury she got,

(Testimony of Dr. Max Mark Bocek.)

the fracture she got, has had a poor, satisfactory, or good result?

Mr. Hudson: To which, if the Court please, we object.

The Court: I will overrule the objection. I think it goes to the extent of her injuries.

A. Well, up to date it has been poor, I would say.

Q. (By Mr. Gavin): Pardon me?

A. It has been poor, that is, the function.

Q. As of this time? [287]

A. Yes, that is right. [288]

* * * * *

Q. (By Mr. Gavin): Well, can you explain the basis of your conclusion then, Doctor, in this respect?

A. Well, it's an idealistic one that any time you treat a fracture you try to get as near to a normal result as you can. In other words, if you have a fracture, you try to get it back in as good a function as you can; a good result, or completely unsatisfactory, or a complete failure; in my mind that is the way I grade them.

Q. Then, that is the question I was asking, the basis of your comparison is that you are comparing it to a completely good result in a fracture, where you get back [289] the complete use and function of your foot as it was before?

A. Compared to an excellent result, yes.

Q. Now, in fractures of this kind, though, where they are compound and comminuted and appar-

(Testimony of Dr. Max Mark Bocek.)

ently as extensive as apparently you have described them from your pictures here, is it an unusual thing in treating this type of fracture for a lady such as Mrs. Wong to end up with results such as she now has?

Mr. Hudson: Now, if the Court please, that is asking the same question another way that he already elicited the information on from the Doctor, and I will object to it.

Mr. Gavin: Maybe fractures of this kind produce poor results.

The Court: I will overrule the objection.

Q. (By Mr. Gavin): Oh, all right, I see. Do you understand the question, Doctor?

A. Yes. In the presence of such severe damage, is this quite common to have this result? Yes, I think it is. If you injure a joint severely, as severely as that.

The Court: Is that all, then, Mr. Gavin?

Mr. Gavin: I think that is all.

The Court: All right, any redirect? [290]

Redirect Examination

Q. (By Mr. Hudson): Is it just as common, Doctor, that you get a good result in injuries such as this?

A. Well, I would say that to get what I regard as an excellent result, would be rare with such a severe injury.

Q. A good result would not be unusual?

A. Well, you can get a certain percentage of

(Testimony of Dr. Max Mark Bocek.)

good results, yes, and a certain percentage of poor.

Q. Now, Doctor, is it ordinary in a fracture of this nature that gas gangrene develops?

A. No, it is not usual.

Q. It is somewhat of a rarity, isn't it?

A. In my experience, it is rather rare.

Mr. Hudson: I believe that is all, Doctor.

The Court: Did you have any other questions?

Mr. Splawn: No questions.

Recross Examination

Q. (By Mr. Gavin): I have one, Doctor. Gas gangrene, is that the kind of condition that produces this pus drainage that we have heard about here?

A. No, gas gangrene is a very acute condition.

Q. I know, can the deep gas gangrene produce pus and drainage, that sort of thing; that isn't what gas gangrene [291] is, is it?

A. No, gas gangrene is a disease that produces an acute breakdown of tissue, degeneration of tissue, due to the compression of gas or exotoxins put out by the organism.

Q. The kind of pus or drainage that we have been talking about is not produced of a gas gangrene, is it?

A. No, it's secondary infection left in the bone.

Mr. Gavin: That is all.

Redirect Examination

Q. (By Mr. Hudson): Doctor, the condition

(Testimony of Dr. Max Mark Bocek.)

of the pus is the result of gas gangrene, is it not, of the osteomyelitis?

A. I don't think so, I think it's more of a secondary infection following.

Q. Secondary infection of gas gangrene?

A. A secondary infection of a different organism.

Q. Gas gangrene is extraneous, is it not?

A. That is true.

Q. It can be fatal? A. Yes.

Q. Is it usually fatal?

Mr. Gavin: Well, your Honor, I am sure nobody has died here. I think that is way off.

The Court: I will sustain the objection on that.

Mr. Hudson: I believe that is all. [292]

The Court: Any other questions?

Recross Examination

Q. (By Mr. Gavin): One more, in the light of what he has asked: Would the presence of gas gangrene infection in this case have any effect on the areas of osteomyelitis, such as this patient has?

A. Oh, it's possible because it could have, at the time it was present, could have caused tissue area, tissue breakdown.

Q. I am talking about at the time that you saw it, Doctor.

A. Well, it might be possible to speculate back and say that it was partially due to that, partially due to damage done at the time, although usually gas gangrene is an acute condition.

(Testimony of Dr. Max Mark Bocek.)

Q. That comes and is treated, and then goes, is that right? A. Yes.

Q. Would the surgeon or anyone else who was connected with this case at the time any gas gangrene occurred, be in a better position to give us an opinion, than looking at it as you are many months later?

A. The man who treated the thing, he would be better able to tell you what happened, I can't.

* * * * *

ROSE WONG

the plaintiff, recalled as a witness in her own behalf, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Gavin): Now, Mrs. Wong, I think that at the time we interrupted our testimony yesterday when I was questioning you, for Dr. Bocek, that we had been talking about the surgery that you had the first time that you went to Memorial Hospital the day of the accident. I think we got to the [296] point where you came to later in a hospital room in the hospital, is that right?

A. Yes, I did.

Q. The records which are, particularly No. 2 that we just had admitted here, indicate that after your first surgery you were in Room 208 at the hospital. Now, I don't know whether you remember that or not. Do you remember that?

A. I would have no way of knowing.

(Testimony of Rose Wong.)

Q. Do you remember that you were on the second floor, originally? A. Yes.

Q. All right. Now, Mrs. Wong, when is it that you first identified or became aware of the fact that Dr. Lugar, Leland Lugar, was the physician who had performed the surgery and treatment on you at the time on the day of the accident, in surgery?

Mr. Hudson: If the Court please, I object to that. There is no testimony so far that he did.

Mr. Gavin: Well, we would find out from the witness.

The Court: Well, your question assumes that he did. I think you should ask her whether he did or not.

Mr. Gavin: Well, I might call your attention, your Honor, to one of the documents in Exhibit 1, which is a report [297] of Dr. Lugar describing the surgery that he did in reducing a compound fracture to the lower one-third of the left tibia on 10/17/55. Now, that should be sufficient foundation, I think, for the question.

The Court: Well, you are asking her when she first became aware. It assumes that she did become aware, maybe that is a little technical.

Mr. Gavin: I think that is a good objection, your Honor.

Q. Did you become aware or were you advised at any time, Mrs. Wong, that a Dr. Leland Lugar had performed the surgery on you?

A. Yes, I became aware of it.

(Testimony of Rose Wong.)

Q. The point I am trying to get to is when did you become aware of that?

A. Dr. Lugar visited me in my room during the, that is, I can't tell you whether it was the second or third day that I was in the hospital.

Q. And did he talk to you about your surgery, is that how you found out?

A. No, sir, he didn't talk to me about the surgery.

Q. Well, you found out; how did you find out that he had done the surgery?

A. I have no concrete recollection of any specific words, I know I became aware of the Doctor's visits, or it is [298] a possibility Dr. Zimmerman mentioned it, I cannot remember exactly.

Q. I see. When did you first become aware of the fact that Dr. Lugar had any part in your case at all, Mrs. Wong? A. When he visited me.

Q. I see. I got the impression from your deposition that you had become aware that there was a man by the name of Lugar or at least a doctor whom you later recognized by his voice and appearance sooner than that, that you remembered this man talking as you came out of the anesthetic at the surgery?

A. No, sir, I don't remember anybody talking when I came out of the anesthetic.

Mr. Gavin: Well, pardon me just a moment, your Honor, so I can mark this point and find it.

Q. To refresh your recollection, Mrs. Wong, I am referring to page nine of your deposition that

(Testimony of Rose Wong.)

was taken in March of 1957, starting at line fifteen, do you remember these questions and answers:

“Q. When were you aware of the fact that Dr. Lugar had had anything to do with your case?

“A. I heard someone cursing when I went out from under the anesthesia. I did not know it was Dr. Lugar but after I saw him in my room I [299] knew it was the voice I had heard.”

A. Yes, when I went out under the anesthetic, not “from under.” I can’t go from under. There must have been an error in the transcription. I am sure I heard his voice that I recognized to be Dr. Lugar’s, later, and he was using words that were profane.

Q. And where was this, that is what we were getting at?

A. That was before I fell asleep under the anesthetic.

Q. I see, at the time of the first surgery?

A. Yes, sir.

Q. All right. Now, later, that would be in the surgery at Memorial Hospital, at the time you were taken there, would it?

A. You are speaking of October 17, sir?

Q. Yes, Mrs. Wong.

A. That is the first time we are talking about, yes, sir.

Q. Then later you saw Dr. Lugar on a number of occasions, did you not? A. Yes, I did.

Q. He visited you in connection with your treatment at the hospital? A. Yes, he did.

(Testimony of Rose Wong.)

Q. How often did he see you, Mrs. Wong, immediately following the first surgery?

A. There was no pattern to his visits. They were at [300] intervals, sometimes two, sometimes three days, or there might have been a time or so that he would have visited consecutive days.

Q. There may have been times, for example, when he, after this first surgery, when he may have visited you twice on the same day, too?

A. I have no memory of such an occasion.

Q. Are you testifying that that did not happen, or you just have no memory?

A. I can't remember if that happened.

Q. And it was definitely during the first week while you were on the second floor, following the first surgery, that you did understand or learn that he had performed the surgery on you following your accident?

A. Yes, sir.

Q. Now, there is no question, is there, in your mind, Mrs. Wong, that after the first week, I mean from the time you were admitted to the 24th, that he performed the second surgery?

A. No, sir, I think—may I make an explanation?

Q. Well, yes.

A. Up until the time they put the mask over my face it was Dr. Lugar in attendance.

Q. I see. Well, in other words, you have no reason to say that he did not perform the surgery?

A. That is true.

Q. And following that second surgery did Dr.

(Testimony of Rose Wong.)

Lugar continue to visit you in no regular pattern, of course, but did he visit you in connection with that surgery at the hospital at your room?

A. He visited me.

Q. And according to the record, I don't know whether you remember this, Mrs. Wong, but you were then in room 405, or on the fourth floor; do you remember being on the fourth floor?

A. Yes, sir.

Q. Did you remain there on the fourth floor throughout your stay then at the hospital?

A. Yes, sir.

Q. Now, there was a third, I guess, procedure performed on you, was there not, a third surgery sometime in November? A. Yes, sir.

Q. Now, you say you do not know whether that was performed by Dr. Lugar or a Dr. Brundage, is that what I understood you to say yesterday?

A. I don't recall we talked about that yesterday.

Q. I see. Well, in what context did you use the name Dr. Brundage?

A. I can't remember my exact words nor the question that was concerned, truly. I can't bring to mind the exact [302] question, sir.

Q. I see. Well, do you know who Dr. Brundage is? A. Yes, I do.

Q. Yes, Dr. Brundage is also a surgeon here in the community, is he not, in Yakima?

A. I understand he is, yes, sir.

Q. And there was a time was there not, Mrs.

(Testimony of Rose Wong.)

Wong, during the time you were in the Memorial Hospital when Dr. Lugar went on a trip to some convention, during that period of time in addition to Dr. Zimmerman seeing you, did Dr. Brundage? He saw you on at least a few occasions, isn't that right? A. Not at that time, sir.

Q. He never saw you while you were in Memorial Hospital?

A. Yes, he saw me, but not that I identify with the time that Dr. Lugar was out of town, sir.

Q. I see. When was the time, then, that Dr. Lugar was out of town?

A. I cannot tell you the exact date.

Q. Now, do you remember going to the surgery the third time? A. No, sir.

Q. And is that why you say you do not know who performed the surgery?

A. That is right, sir. [303]

Q. I see. All right, I think you told us yesterday that on the 24th day of October, that is, the week after the accident, you became aware or were told that you were being administered something called anti gas gangrene toxin?

A. Would you repeat that statement, please?

(Last question read.)

A. Yes, sir, I stated yesterday that they took a skin test at subsequent hours, what hour I don't know nor the lapse of time; they came in and told me they were administering anti gas gangrene.

The Court: Pardon me, just for the sake of clarity, by "they" you mean the hospital attend-

(Testimony of Rose Wong.)

ants? A. The nurses, yes, I am sorry.

The Court: All right, go ahead.

Q. (By Mr. Gavin): And following that do you recall that this same medication or drug was administered to you on other occasions?

A. I am not clear, sir, I remember the first injection.

Q. I see. Would you say that no other injections of this particular drug were made upon you at all, Mrs. Wong, while you were there?

A. I am not clear, no statement that I can remember was made to me.

Q. I see. But you do remember as you remained there at [304] the hospital that you were given medication of some kind almost every day, were you not? A. Yes.

Q. And these were normally given by the nurses, I assume? A. Yes, sir.

Q. Now, your hospital course ended at what time, do you remember, or perhaps I can tell here better for you. It says, "Date of Discharge, December 13, 1955, at 3:15 p.m."? A. Yes, sir.

Q. Yes. And then where did you go, Mrs. Wong?

A. I returned to our home, which was in the tenant house on the Swier farm.

Q. I see. Now, of course, you continued to receive treatment, did you not, during, or from that time forward? A. Yes, I did.

Q. You have told us about seeing Dr. Bocek and he has been here to describe the treatment he

(Testimony of Rose Wong.)

gave you, but you didn't see him for many months after your discharge, did you?

A. The first time I saw Dr. Bocek with regard to my injury was on the advice of Dr. Zimmerman.

Q. Yes, Dr. Zimmerman referred you to Dr. Bocek, did he not? A. Yes, sir. [305]

Q. But from the time that you were discharged from the hospital—strike that, pardon me.

Were there three times that you had surgery?

A. When, sir?

Q. At the hospital.

A. I was in surgery one, two, three, four times, sir.

Q. The fourth time, I think, was to change your cast, was it not? A. Yes, sir.

Q. And three times in which they did surgical work upon your leg? A. Yes, sir.

Q. All right. Now, following your discharge from the hospital it is true, is it not, that you were treated regularly, then, by Dr. Zimmerman, the defendant here? A. I was, sir.

Q. And that treatment continued up until when?

A. April, 1957.

Q. Yes. Now, you saw him, as I understand it, at varying times? A. I did.

Q. It might be as often on some occasions as what, every other day?

A. Not unless it was directly after surgery, sir.

Q. Well, there were occasions, I think, when you told us [306] you saw him as often as every other day in his offices out at Cowiche?

(Testimony of Rose Wong.)

A. After he took the walking cast off, the ankle broke out (indicating), that is, it swelled and discolored, and I went, as I remember it, every other day to have him look at it and advise me as to its care.

Q. What would be the longest period of time that would elapse in your seeing him for treatment after you returned to Cowiche between treatments?

A. Approximately four weeks, it might vary a day or so either way.

Q. I see. But it was regular calling for treatment from the time you got out until April of 1957?

A. Until April, I don't remember the exact date, yes, sir.

Q. And you continued, as a matter of fact, to go to Dr. Zimmerman for treatment, even after you instituted this lawsuit, did you not?

A. I am not sure if the lawsuit had been filed or not. I cannot tell you. [307]

* * * * *

Q. (By Mr. Gavin): And you continued to go to Dr. Zimmerman until April of 1957?

A. That is right, sir.

Q. You went for treatment then to Dr. Bocek to whom he recommended you, is that right?

A. Do you mean to tell me he recommended at that time and I accepted his recommendation?

Q. No, I mean to say that he had recommended Dr. Bocek to you, and you continued with Dr. Bocek.

(Testimony of Rose Wong.)

A. I had come to know Dr. Bocek and I then went to Dr. Bocek for treatment, yes, sir.

Q. Incidentally, do you have any physician or surgeon who treats you now at your home in Portland now on any regular basis? A. No, sir.

Q. I see. Well, even after this suit was instituted [308] against Dr. Zimmerman, is it not true, Mrs. Wong, that you told him on a number of occasions when you visited him that you had no complaint against him at all about his treatment of you or of the manner in which he cared for you?

A. I told Dr. Zimmerman that his care had been good with the exception of the neglect of administering tetanus anti gas gangrene, yes, sir.

Q. Well, that isn't quite it yet, you deny that you told him that you were completely satisfied with the treatment and care that he had given you on a number of occasions when you went to see him, even after you brought the lawsuit.

A. At each time that I visited with Dr. Zimmerman and talked to him about that, I mentioned specifically that I was not satisfied with the fact that I had not been given tetanus anti gas gangrene shots.

Q. Well, I understand you to say that, but my question is this, Mrs. Wong: Do you deny that you told Dr. Zimmerman, without any qualifications, on a number of occasions as he treated and cared for you, that you had absolutely no complaint about the way he treated and cared for you?

A. Yes, I deny that.

(Testimony of Rose Wong.)

Q. Did you continue, for example, Mrs. Wong, while you were [309] in his care and even after you brought this lawsuit, to take your family to him for treatment?

A. My son went to Dr. Zimmerman on one injury. He called from the school and the school is opposite Dr. Zimmerman's office. He had fallen playing basketball, and he went to his office to have the stitches taken.

Q. Do you deny that any of your other children went to him at your request and at your suggestion for treatment?

A. I have no recollection of my children going.

Q. I see. You would say that they did not?

A. They did not, as far as I took them, I never took them, no, sir.

Q. Now, incidentally, did you ever visit Dr. Lugar in his offices in Yakima?

A. I visited him on the advice of Dr. Zimmerman once.

Q. I see, do you remember when that was?

A. I can't tell you the date but I can tell you the circumstance.

Q. No, I am wondering about the date, Mrs. Wong.

A. Just a moment, I can just about give it to you. [310]

* * * * *

Q. This would refresh your recollection as to an office visit you made to Dr. Lugar?

A. Yes, sir.

(Testimony of Rose Wong.)

Q. It is a bill of his for \$5.00, dated June 1st, 1956 (hands paper to witness)?

A. Yes, sir.

Q. Well, by refreshing your recollection, then, Mrs. Wong, can you tell us when would be the only date, I assume, about when you made an office visit or paid an office call to Dr. Lugar?

A. Yes, it was between April 26 and May 3rd, thereabouts.

Q. 1956? A. Yes, sir.

Q. I see. Well, now, as a matter of fact didn't your relationships with Dr. Zimmerman continue on such a friendly basis that you even went to the extent of sending him a postcard when you took a vacation trip one time, a friendly postcard?

A. I advised Dr. Zimmerman I was going to visit my sister in Denver, Colorado, and had to wait—well, I don't remember, but a space of time until he thought the surgery which he had performed was sufficiently healed that it was safe for me to go; and upon having his permission to go, he said, "Mrs. Wong, don't do any [311] skiing." When I arrived in Colorado it was wintertime and I have a sense of humor, so I picked up a card and it was a picture of people skiing, and I said, "Send it to Dr. Zimmerman."

Q. I am glad you have a sense of humor, but that would be an example of the friendly relations that you maintained with Dr. Zimmerman, would it not?

A. If you choose to call it that, yes, sir.

(Testimony of Rose Wong.)

Q. You mentioned, for example, seeing a Dr. Lowell? A. Yes.

Q. That is his name, Noall or Nowell?

A. I believe they call it Noall.

Q. That is when you were making a trip to Portland, was it, after this accident, or after you had been out at Cowiche?

A. The first time I visited Dr. Noall I was advised by Dr. Zimmerman, I had other business in Portland at the time, and he said it would be well if I would call at his office for an examination.

Q. I see, and you followed Dr. Zimmerman's advice and recommendation in that respect, did you?

A. Yes, sir, I went. [312]

* * * * *

Cross Examination—(Continued)

Q. (By Mr. Splawn): Directing your attention, Mrs. Wong, to your testimony yesterday wherein you indicated that you had been unemployed and non-earning since the date of the accident, I ask you this, as of last November, November, 1957, is it not a fact that you were having Bible study in your home, 20 to 30 people present each Wednesday and Thursday, and that you were taking regular services at the Open Bible Church in Portland?

A. No, sir, we were not taking regular services, we did have Bible study, do have Bible study at our home, yes, sir.

Q. Well, then, that was a part of your Gospel work, I assume?

A. That was not employment, no, sir. [313]

(Testimony of Rose Wong.)

Q. Was that the usual kind of Gospel work you had been doing prior to the accident, that is, having a number of people at your home or some other place, and doing Bible study?

A. No, sir, upon going to Portland we had a Bible study group. They do not employ us, we receive no remuneration for those services, and it is not employment. They gather around the table, I sit down, once a week. Referring to the other statement there, the pastor of that particular church had been out of town; we filled in on Thursday night and one Sunday night; the Thursday night might have been two or three——

Q. (Interposing): In other words, you were not having regular Bible study in your home, but only fill-in?

A. No, I did not say that, sir. I said we had Bible study every Thursday night at our home, yes, sir.

Q. I see. What I am getting at was that that is continuing up to the present time, is it?

A. Yes, we do.

Q. Well, is that the kind of work that you had been doing prior to the accident?

A. No, sir, we had never had Bible study in our home prior to the accident.

Q. I see. Now, when you talk about silver offering, I think you mentioned yesterday, I mean the way you became [314] compensated for your work when you were doing it before the accident, as you testified, it was by way of silver offering?

(Testimony of Rose Wong.)

A. I used no such words.

Q. Well, I mean it was contributions, apparently, that you received?

A. I received contributions, yes, sir.

Q. Yes; so, incidentally, since the accident, over what period of time have you been having these Bible study groups at your home?

A. From about the middle of September to the present time.

Q. I see, and it is your testimony that you received nothing from these people who attend your Bible study? A. That is correct, sir.

Q. Now, so far as taking regular services at the Open Bible Church in Portland, has that been irregular or occasional?

A. We have not been there for some months, sir.

Q. Well, last November, for example, or prior to last November, were you and your husband taking regular services at the Open Bible Church?

A. Regular Bible study for two or three weeks. I think the sum and total of those Bible studies were four times, sir.

Q. I see, and was there any compensation derived from that, [315] for example, as you had before the date of the accident?

A. One offering, sir.

Q. I see. Now, did you last November, with respect to regular services at the Open Bible Church in Portland, indicate to anyone that it was your desire then to permanently take on these meetings and continue them? A. No, sir.

(Testimony of Rose Wong.)

Q. Did you have any opportunity offered you last fall to take on regular services at this particular church on a permanent basis?

Mr. Hudson: If the Court please, I would like to object to that last question at the present time. We are not asking for loss of wages. I don't believe that it is pertinent, I don't believe that it is relative.

Mr. Splawn: It is her capacity, your Honor.

The Court: Yes, I think it has a probative value, perhaps, on the question of loss of earning capacity, and I will overrule the objection on that ground.

Mr. Hudson: Yes, sir.

Q. (By Mr. Splawn): Did you not write Mrs. Swier as late as November 5, 1957, and state to her in the letter that they, referring to the Open Bible Church at Portland, "would very much like for us to permanently take these meetings"?

A. What meetings? [316]

Q. Regular services at the Open Bible Church.

A. No, sir, they were not regular services, sir.

Q. Did you write Mrs. Swier that these services were regular services at this church?

A. I cannot remember the context of my letter, I have never been invited to take regular services at the Open Bible of Portland.

Mr. Splawn: Well, your Honor please—

The Court: Do you wish to have that marked?

Mr. Splawn: May I have this identified?

(Whereupon, Defendants' Exhibit No. 19 was marked for identification.)

The Court: 19?

(Testimony of Rose Wong.)

Q. (By Mr. Splawn): I hand you, Mrs. Wong, what is denominated Defendants' Identification No. 19 and ask you if you recognize that as a letter written by you to someone (hands paper to witness)? A. Yes, it was written by me.

Q. And it was written to whom?

A. "Dear Sister Swier."

Q. I see, and you wrote the letter and mailed it to her, I assume?

A. I mailed it to her, I wrote it.

Q. Now, will you refer to the first page of the letter. [317]

* * * * *

Q. (By Mr. Splawn): In respect to your income as you testified that it was before receiving your injury did you and/or your husband ever make income tax returns on it?

A. Yes, we did. [318]

* * * * *

Redirect Examination

Q. (By Mr. Hudson): What type of farm were you raised on, Mrs. Wong?

A. I beg your pardon?

Q. What type of farm were you raised on?

A. Well, it was a pioneer farm, irrigated.

Q. It was not a fruit farm?

A. No, sir.

Q. There were not commercially grown apples, pears and cherries? A. No, sir.

Q. You had no experience in your childhood with apple orchards, pear orchards or cherry or-

(Testimony of Rose Wong.)

chards? A. In my childhood, no, sir.

Q. We were speaking about yesterday's testimony, about an orderly, in yesterday's testimony. Do you know that that orderly was not either Dr. Zimmerman or Dr. Lugar? A. Yes, I do.

Q. How do you know that?

A. I know his name.

Q. The orderly's? A. Yes, sir.

Q. What is it? A. George. [321]

Q. Who?

A. George, they called him "George."

Q. Now, this morning you testified to the fact that you had no memory of going to surgery the third time? A. Yes, sir.

Q. Will you tell me why you had no memory of it?

A. I was put to sleep before I was taken to surgery.

Q. In other words, you were under anesthetic prior to leaving your room?

A. They had given me capsules that had put me to sleep, yes, sir.

Q. That is the reason you don't remember going there, you know that you were going and you know that you had been there, eventually?

A. Yes, sir. [322]

* * * * *

WALTER SWIER

the defendant, recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): You are Walter Swier?

A. Yes.

Q. One of the defendants left in the case?

A. Yes.

Q. Walter, how many acres in orchard do you have, or did [410] you have in October, 1955?

A. Twenty acres bearing.

Q. The particular ladder, which is Defendants' Exhibit 1, in what type of storage, if any, has it been?

A. Well, for over two years it has been in dry storage.

Q. Yesterday did you hear the testimony of the plaintiff, Rose Wong, as to the ground on which she set the ladder at the tree in question?

A. I did.

Q. With respect to the actual ground, tell us where the accident occurred; at that tree did that description fit the actual condition as it existed during the fall or the apple-picking season in 1955?

A. Yes, sir.

Q. Did you bring to court three cases of ground or earth? A. Yes, sir.

Q. And what similarity, if any, is there between what you have brought into court and the plaintiff's own description yesterday of the ground on which she set the ladder?

(Testimony of Walter Swier.)

* * * * *

A. The ground is identical. [411]

* * * * *

CECIL C. CLARK

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is Cecil C. Clark? A. That is right.

Q. Where do you reside?

A. Lombard Loop, that is Route 2, Wapato.

Q. What is your occupation?

A. Fruit Grower. [419]

Q. What has been your experience in that field, and also, relative to three-legged ladders for fruit picking purposes, will you give in detail your background experience in those respects?

A. Well, I suppose you would start with the fact that I was born in an orchard out here on South Knob Hill. I am 62 years old now and I was practically raised on an orchard. I started fruit growing on my own at eighteen and all but four years since then I have been associated with orchards and the handling of ladders. I was making a hasty estimate this morning of, perhaps, the time that I had spent on a ladder, and I have come up with something like ten thousand hours actually working on a ladder myself.

Q. Do you own your own farm?

A. Yes, I have something in excess of 200 acres

(Testimony of Cecil C. Clark.)

of orchard and, incidentally, I have 321 ladders at the present time. In addition to that, about my familiarity with ladders, I might say that I have in the past borrowed lots of ladders and I would estimate at least a thousand or more.

Mr. Hudson: I didn't understand that.

A. I have borrowed at least a thousand or more ladders during my operation, from other orchardists, because I didn't have enough at times. [420]

Q. (By Mr. Splawn): The area where your orchards are located you indicated was the Lombard Loop area, and where is that in the Yakima Valley?

A. Well, that takes off of Highway 410 at Sawyer, which is 14 miles down 410 from Yakima.

Mr. Hudson: Would you locate that as to where it is with reference to Cowiche?

Q. (By Mr. Splawn): About how far; you know where Cowiche is, do you not?

A. Well, it's pretty near as far the other side as Cowiche is from Yakima.

Q. And are your orchards located in what is commonly called the Yakima Valley?

A. Oh, yes.

Q. Now, in addition to the experience which you have referred to, what offices or directorships or memberships have you held or now hold in agricultural organizations or in agricultural activities, or anything having to do with that?

A. Well, that is quite a list. At the present time I am a member of the board of the Washington

(Testimony of Cecil C. Clark.)

Cannery Co-op, which has a cannery here in Yakima.

Q. Incidentally, are you a member of the Washington State Legislature?

A. Yes, I am. [421]

Q. And have been for how many sessions?

A. Three sessions.

Q. And are presently a member of the Washington State Legislature? A. Yes.

Q. And what committees did you serve on in that respect?

A. Well, my first session there I was chairman of the Horticultural Committee and was on Taxation and Revenue, Industrial Insurance, Reclamation and Agriculture. The second session they did away with the Horticultural Committee and I was on Agriculture, and no Republicans had any chairmanships at that time, so I didn't have a chairmanship, so I was on Revenue and Taxation and Reclamation again; oh, right offhand I don't remember. They were not important committees. Last session I was on Revenue and Taxation, Reclamation, again Agriculture, and Institutions.

Q. Now, are you connected or have you been connected in any way with the Washington Freestone Peach Association?

A. Yes, sir, I helped organize it and was the president of it for two years. The same things happened about the Pear Association; two years before that I helped organize that and was head of that for two years. I am, also, president of the Wash-

(Testimony of Cecil C. Clark.)

ington State Reclamation Association at this time. Now, do you want a list of [422] some of the things I have been into in the past?

Q. Yes, I mean along the lines which I have indicated, Mr. Clark, to indicate your background.

A. Well, I can't give you the exact years without referring to them, but I was president of the Washington State Horticultural Association, I think that was 1952, somewhere back in there. I have a citation of merit as a special award from the Washington State College for services rendered to horticulture. I have a special citation of merit given to me this winter signed by the Pear Association and Peach Association, of the Bargaining Association.

Q. Is that Washington State?

A. Yes, the one that I was president of. The Washington State Fruit Commission and the Washington State Apple Commission, listing out my services to horticulture, and it was a thing I appreciated very much. For about four years before I was elected to the Legislature I was chairman, or not chairman, excuse me, I was a member of the Special Farm Labor Committee that was advisory to the National Farm Labor Committee that was advisable to the Secretary of Agriculture in Washington. And on that committee I was on a special subcommittee on Mexican Nationals, representing the five northwest states, and in the course of that duty I made a number [423] of trips to Washington, D. C. on farm labor matters. I was also chair-

(Testimony of Cecil C. Clark.)

man of the Farm Labor Committee that was organized here when the Korean War started, which didn't function very much because we didn't need it, but I was a member of the Yakima Valley Food for Victory Committee all during the Second World War, and one of our jobs was to bring in Mexican Nationals and handle them.

The Court: Pardon me, I am reluctant to interfere, but we have a definite time limit in these cases. I would like to finish this case this week if we can. You are qualifying this man as an expert on ladders, aren't you?

Mr. Splawn: No, just his background so the jury can evaluate him as a man who has been in business and knows ladders.

The Court: Well, as I say, you are qualifying him as an expert on ladders. I think his testimony should be confined to something that has some remote knowledge of ladders and some bearing upon ladders. I don't mind his listing this, I am sorry to cut it off, but in the interests of time I think he should be a little bit brief about it.

Mr. Splawn: Thank you.

Q. Now, Mr. Clark, do you recognize a particular ladder in the courtroom?

A. Yes, I have seen it before. [424]

Q. That ladder, for your information, is marked Defendants' Exhibit 1, and you have seen that ladder before?

A. That is right.

Q. And do you remember the place where you saw it?

(Testimony of Cecil C. Clark.)

A. Yes, over at the Dependable Ladder Factory where that ladder was originally made.

Q. I see. And has that been sometime this year?

A. Oh, it was within the last two or three weeks.

Q. I see. While there, did you make any tests on the ladder?

A. Yes, I looked it over and I set it up and climbed it.

Q. Do you have any familiarity, from your experience as you have referred to it, with ladders in common use in the Yakima Valley?

Mr. Hudson: Now, if the Court please, Mr. Clark is about to commence testifying as an expert. I don't question that he is a very fine man, but up to the present time he has not qualified or has not been qualified to express an expert opinion about ladders. He owns 300-odd of them. He has spent ten thousand hours on them, he has borrowed a thousand of them, but up until the present time he is not qualified to express an opinion about a ladder, except as he recognizes it. I have driven automobiles since 1911, but I am not an automobile expert. To qualify this gentleman as an expert on ladders, he has got to show a lot more [425] than having used them. His physical makeup, his agility, all those things might enter into what would be a safe ladder for him and not safe for me, and I think he is not entitled to express an expert opinion.

The Court: Well, I will overrule the objection. I think that his qualifications are a matter for the

(Testimony of Cecil C. Clark.)

jury. It will go to the weight rather than the admissibility.

Q. (By Mr. Splawn): Mr. Clark, what familiarity, if any, have you gained through the years and up to the present time of ladders in common use for apple picking purposes in the Yakima Valley?

A. Well, my various associations with the things I have listed have brought me in contact with many growers and I have been on many growers' places and observed a great many ladders besides those I have borrowed and used of my own.

Q. Now, having inspected this ladder and tested it as you have indicated, state whether or not this ladder with all its aspects and features and its condition, and I assume you observed those, did you?

A. Yes, sir.

Q. Will you state whether or not, as it now stands, it is a ladder in common use in the Yakima Valley?

Mr. Hudson: Just a minute, Mr. Clark, I object to that question. There is a difference in the thousand ladders [426] in common use around here. It is this particular ladder; it isn't some other ladder, it isn't a group of ladders. No one can express an opinion as to a thousand other ladders around here. He can't discuss a comparison between this and a thousand other ladders in the valley. It's a question of whether his opinion is correct or not.

Mr. Splawn: I think that is for the jury to determine. In other words, it would be physically im-

(Testimony of Cecil C. Clark.)

possible for any human being to know all the ladders but certainly, of course, in our societies we get general representation.

The Court: I will overrule the objection, he may answer.

(Last question read.)

A. Can I ask you a question? Do you mean how it compares with other ladders?

Q. (By Mr. Splawn): In common use in the Yakima Valley. A. Yes.

The Court: Yes, he doesn't mean whether this ladder is in common use, but whether it is the kind of ladder that is in common use?

Mr. Splawn: I am including all of the features of this ladder.

The Court: Yes, I understand.

A. Well, in the first place, there is more of that kind of ladder used in the Yakima Valley than any other kind. [427] More of my ladders are of that make than any other five or six varieties that I have.

Mr. Hudson: Pardon me, Mr. Clark, you are referring to the brand?

A. Yes, and as far as the condition of the ladder, it's much better than the average ladder that is given to a picker in the Yakima Valley.

Q. (By Mr. Splawn): And when you refer to the condition of that ladder you are referring to all aspects of it, are you?

A. All aspects, just the way it stands there.

(Testimony of Cecil C. Clark.)

Q. And in your testing of the ladder you found that the tongue has some play in it?

A. Oh, it has a little play which is, perhaps—it is not detrimental, a little play there is beneficial.

Q. And the reason for that is what?

A. A ladder that is too rigid is more prone to tip than one that has a little give to it.

Q. Now, in your testing of this particular ladder, describe as you recall, Mr. Clark, what you did when you went over the ladder and tested it?

A. Well, I checked the steps to see if they were tight. They were. I wiggled the tongue to see what the condition of that was, and it was satisfactory, so I set it up and climbed it and went to the eighth step, wiggled [428] it and shook it all the way up, and it was perfectly safe to use, and if you put it on a tree, I will go to the top, the tenth step. I have got a little too much claustrophobia, or something, in the open air to go beyond the eighth step, but it is perfectly safe to go to the top step and work on it.

Q. Now, so far as static weight is concerned, and by that I mean just standing on any rung of the ladder up to and including the last rung before the very top, with no impacting of the ladder, no shaking, no jerking, no reaching to one side or the other, but dead-weight, is there anything about that ladder that could conceivably cause it to tip over or collapse?

A. No, there is nothing about the ladder. A picker on that ladder to fall has got to do one of

(Testimony of Cecil C. Clark.)

two things; first, is to either improperly place the ladder, set it up wrong, or else lean too far out; and with the numerous falls I have had on my place and with the ones I have made myself—I have fallen off a ladder a number of times just simply because of reaching out too far to get the last fruit and didn't want to get down and move it, just reaching out too far, that is what pretty nearly always makes a ladder tip over, unless it's improperly set up. [429]

* * * * *

Q. Above the sixth rung, Mr. Clark, that is taking the ladder above the sixth rung, that is standing on it at any rung above the sixth rung, is there any difference in that that you can see or that actually exists to make it unsafe for apple picking purposes?

A. Not as far as this ladder is concerned. Of course, the higher you go on any ladder, the easier it is to overbalance it by leaning.

Q. Is that a ladder condition or is that a picker maneuvering?

A. Well, that is a picker maneuver.

Q. Now, the higher you go on this ladder, and so far as any play is concerned in the tongue assembly at the [430] top, what is the effect as you take weight up the ladder, so far as that condition is concerned?

A. Any condition with the top of that ladder would make no difference on any step on it clear to the tenth. As I said, I would not hesitate if it was in a tree, to get on the top step and pick a prune, or

(Testimony of Cecil C. Clark.)

any other thing. Of course, I wouldn't want to lean way out across the tree, I would have to use some judgment about handling myself on it.

Q. Now, among the ladders, for example, which you have borrowed and you yourself own, do you have any ladder such as that in that condition, such as you found the condition of that ladder to be in all respects?

A. Yes, I don't see anything wrong with that ladder.

Q. What about your own?

A. I have some that need repairing, always do, and we repair quite a few of them, but I would not bother to repair a ladder like that because it doesn't need it, there is nothing to do on it. If I was hiring out to somebody to pick fruit—

The Court: (Interposing) Just a moment, there hasn't been any question asked. Let's proceed by question and answer.

Q. (By Mr. Splawn): Yes, do you have some further explanation concerning that ladder and its safety for apple [431] picking purposes?

A. Yes, sir. If I went to somebody's orchard to pick apples, and I have done it in the last few years to help out when pickers were short and I didn't have work of my own, and was given a ladder like that I would be perfectly satisfied with it and would go ahead and pick without any question whatsoever.

Q. And that is including the condition at the top?

(Testimony of Cecil C. Clark.)

A. That ladder as it is right there now.

Q. I see. Now, we don't have any ground on which to set it, Mr. Clark. We could wire the legs to the tongue to keep it from slipping because of the floor. Would that give any stability to the ladder to climb up and use, just to climb up and use.

A. Yes, that would keep the thing from slipping on the carpet all right. I would say, even so, your condition would be worse in here than it would be out on the ground.

Q. Yes. Now, with respect to the sides of that ladder, can you push in one side and cramp the ladder?

A. Well, yes, when there is nobody on it, sure; but when there is somebody standing on it, why, it would be more difficult.

Q. What can you do with a brand new ladder so far as doing the very same thing? [432]

A. Well, you can push a new ladder around sideways. I don't see that a new ladder would be any better than this one to pick up. In some respects it wouldn't be as good. When we get new ladders we are always happy after they are conditioned in a while, because they are a little too rigid, and they need to have a little bit of flexibility in the top. The fact of the matter is, when you tighten a ladder up and get the top all tight and everything tight, it's more liable to tip over than one that will give a little bit (indicating), not simply because if the picker leans a little bit, instead of the ladder giving a little bit, it just starts to twist, and over

(Testimony of Cecil C. Clark.)

it will go. So that a ladder with a little bit of play in the top is a safer ladder than one that is absolutely rigid.

Q. Now, if you were standing on any rung of that ladder, including the last rung at the top, with the exception of the top platform—

A. (Interposing): You mean the ninth one?

Q. Yes, any one of the first nine, and I will include the top, which has been termed a platform; I will include every rung and the very top of the ladder. If you are standing on any one of those places and not reaching out too far or not overbalanced, is there any action that can possibly take place in that ladder anywhere, [433] including any action at the very top and the assembly at the top, which would cause the ladder to tip, collapse, fall to one side, or to move in any direction?

A. No, not if it is properly set up.

Q. If it is properly set?

A. Of course, if you have got it set off-balance, why then, that is, of course, the picker's job to set it. If you have got the ladder set off-balance, why then any movement would cause it to go down.

Q. Is that only true of used ladders, or is that also true of brand new ladders that have been first set up after they arrived from the store?

A. That is true of brand new ladders as well.

Q. Assuming that that particular ladder has been in dry storage for over two years, what did you discover when you inspected the ladder recently, concerning its tightness, in view of the fact

(Testimony of Cecil C. Clark.)

that it had been actually in dry storage; assume it to have been in dry storage for over two years?

A. Well, it was tight everywhere. There was not excess movement in the top, and it was in first-class condition and satisfactory to pick on.

Mr. Splawn: Your witness. Oh, I had one more question, counsel. I am sorry, Judge; if I may?

The Court: Yes. [434]

Q. (By Mr. Splawn): Assuming these facts: The ladder was set solidly on disked ground and the tongue was centered and placed properly, and a picker was standing on the, it would be the eighth rung from the bottom, and not climbing up or down or moving the feet but turning slightly to the right while so positioned in order to ease off the picking bag approximately half full of Delicious apples from the trim of the ladder; if that were so, can that ladder conceivably tip, collapse or move in any direction?

A. Now, let me review that a little bit, so I can get the essence of that rather long question.

Q. If the ladder is properly set and solidly set on disked ground.

A. And then the picker is on the eighth step with a partly full bag of apples?

Q. Yes, half full, approximately.

A. And then turns slightly to come down?

Q. No, hasn't yet come down, but was about to come down, and both feet still resting on the eighth rung; neither foot was taken off to come down, but turning the body slightly to the right ready to come down.

(Testimony of Cecil C. Clark.)

A. And not leaning out to pick apples?

Q. Not leaning out to pick apples in any direction.

A. The ladder should not move any at all. It couldn't [435] collapse, it couldn't twist, it couldn't do anything.

Q. We are referring to this ladder, are we not?

A. Yes.

Q. If the ladder did tip, then what could only be the cause for its tipping or collapsing or going to one side or the other?

A. Now, we are assuming that it is properly set?

Q. Yes.

A. The only thing that could cause it to tip, then, would be leaning too far, reaching for those two or three apples that you ought to reset the ladder to get and you just don't want to do it, and so you reach just a little too far, and then once it starts, if you throw it off balance by shifting your weight too far, then you can't unless you have got a tray to grab, or something, you can't straighten it up, but with normal procedure of turning and moving around, you have to turn a certain amount to bring your bag of apples down, because you can't bring them straight down in front of you. It's done millions of times, and there would be no reason in the world why you couldn't turn with a full bag of apples, a full boxful, and bring them down without any movement or trouble of the ladder whatsoever.

(Testimony of Cecil C. Clark.)

Q. And that is including the play with this tongue it has in the assembly at the top, is that right? [436]

A. Yes, sir, that last just the way it stands there now.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): I rather got the impression, Mr. Clark, that this particular ladder couldn't be tipped over, from your testimony?

A. I didn't say that; I said that it could only be tipped over by improper setting or by leaning too far.

Q. I have always got the impression that a yoke in the condition that this yoke is in is a better situation than a properly manufactured yoke, is that right?

A. Well, I didn't say that was properly manufactured, sir.

Q. Do you know that, have you looked at it?

A. Yes, sir.

Q. And you think that that is a properly assembled yoke? A. I certainly do.

Q. And if you were building ladders you would build a yoke like that?

A. Well, I built 75 and we patterned them after it.

Q. That isn't what I asked you.

A. Yes, I would build like that; we did build them like that as near as we could.

(Testimony of Cecil C. Clark.)

Q. That is the way you like them? [437]

A. Yes.

Q. You would have it engineered that way?

A. Well, now, just a minute. When I build ladders I don't hire an engineer.

Q. Well, but by plan, scheme and design, you would have your yoke just the way that yoke is, is that right? A. Very similar to it.

Q. Not very similar; you would have it that way?

A. I would have that style, yes. I probably wouldn't have the same dimensions exactly, but it would be that same type of thing exactly.

Q. And you would have the holes in the yoke and in the side pieces the same way that those are?

A. I didn't quite hear that?

Q. And you would have the holes in the yoke and in the side pieces where it connects through with the bolts on each side the same as those are?

A. Yes.

Q. Did you ever look at that? A. Yes, sir.

Q. And you are qualified here as an expert and you want to say and have this jury believe that if you were planning this you would build it that way?

A. Well, when it is first built there would be a little less play in it, but that play develops as you use them [438] and it is no harm; in fact, as I said before, if I were using it myself, I would rather have a little play there.

(Testimony of Cecil C. Clark.)

(Whereupon, counsel Hudson brought the ladder forward to the jury box.)

Q. I wish you would step down here, if you would, Mr. Clark; possibly if you would stand over here, so the jury can see. Now, this is not the yoke that this ladder came equipped with, is it?

A. I think so.

Q. Hasn't this new yoke or repaired yoke been put on there?

A. No, I think what has happened here is that this is another tongue that has been put in because apparently it has had a bolt here and another bolt there. I don't know what has happened, but that would be my assumption, that this is a repaired tongue put in here, it is not the original tongue that was in it, it shows this original opening here (indicating).

Mr. Hudson: Mr. Mullins and Miss Alice, would you step here, please? I would like a recess, your Honor; that is, I would like the jury to be absent.

The Court: Yes, all right, the jury may step out for a recess.

(Whereupon, the jury retired from the courtroom.)

Mr. Hudson: If the Court please, I would like to [439] be sworn.

The Court: Very well, the Clerk may swear you.

The Witness: What do I do?

The Court: You just step aside.

(Witness Withdrawn.)

THOMAS HUDSON

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Statement

Mr. Hudson: My name is Thomas K. Hudson. I reside in Denver, Colorado. My occupation is that of a lawyer. I am admitted to practice in all the courts in that State and the Federal courts. I came to Yakima and I can't give the exact date, but I believe that my associate, Miss Loveland, can supply it. I went with her and Mr. George Mullins to the Dependable Ladder Company where we were shown this ladder. At the time we were there I took a steel rule and I measured the bolts and the top assembly of that ladder, by that I refer to the bolts which connect the yoke to the side pieces. At that time there was three-sixteenths inches of lateral movement in the bolts. At the present time those bolts are tight and there are new washers in there.

I want to express my own opinion and my professional [440] integrity that those bolts have been tightened up since we saw it, and I would like to call Miss Loveland.

The Court: Well, I don't know what you have in mind, Mr. Hudson.

Mr. Hudson: I have this in mind, your Honor—

The Court: The jury is the trier of the facts and I can't decide any fact as to whether the ladder is now in the same condition as it was when the plaintiff fell from it or not, so that I don't think we

(Statement of Thomas Hudson.)

are accomplishing anything unless you wish to put this testimony on before the jury and for the jury's evaluation.

Mr. Hudson: If the Court please, my purpose in giving this testimony now is that I don't want counsel or someone else to shout "Surprise." That is what I am going to testify to before this jury and I am sure that Miss Loveland is going to testify to the same thing, and Mr. Mullins is, that we will take the stand and testify that that ladder has been tampered with.

The Court: I think that in view of the unusual situation here, I know in the State court there is a rule here, I am not aware of any formal, printed rule in this court, that an attorney who takes the witness stand may not then argue the case before the jury without special permission of the Court. Now, of course, I am trying a diversity case and it may be that that rule carries over here; there [441] isn't any formal Federal Court rule but, if so, I think in view of the situation here, since you are the only one who testified, that counsel may testify and have the Court's permission to address the jury.

Mr. Hudson: Thank you, your Honor.

The Court: Let's see, I suppose we may as well take our ten minute recess now.

(Whereupon, a recess was taken for a period of ten minutes.)

(Witness excused.)

(Whereupon, the following proceedings occurred in chambers.)

Mr. Hudson: Judge, now I am at a total loss. I know that that ladder has been tampered with. It is not in the condition it was when we examined it in March. It isn't in the condition it was when we saw it a few days ago. As a matter of information to the Court, I indulge in manufacturing as one of the things I am interested in. I am mechanically conscious. Now, when I was out there I measured the gaps with the steel rule that I borrowed from one of the men out there. Those bolts were readily turnable with your fingers. There are two totally new washers in there now on one side, and two old ones on the other side. Now, I can't use that ladder in its present shape for the same type of examination I could have before it was tampered with. There [442] is no way for me to examine these witnesses that way.

Now, I have been dying to take that ladder apart, as far as that goes, but the hole in the yoke where the bolt comes through, there is three-sixteenths inch play on either side of that bolt, or there was. In other words, the hole of this yoke that is in there now is larger than the hole in the side pieces and it gave a lot of play and due to the looseness laterally, there was a lot of swing and twist in it. Well, it isn't there now. I can't demonstrate it. I am flatly at a loss.

Mr. Splawn: I have a suggestion. In other words, so far as I am concerned, that ladder has not been tampered with at all. There was one wit-

ness present when you first examined it and he has informed me what the measurement was of the arc of play, and as far as I can tell, it's the same as in that ladder now.

Now, I may have a solution for what you think.

Mr. Hudson: Now, I want to make one statement, Homer. While that ladder has been in your custody, I am not trying to impute that you touched or did anything about that.

Mr. Splawn: No, I understand that. It has been out at the Dependable Ladder Company. Now, here is what I suggest we do: I think this is a solution to your problem, I am willing to do this. You have made the statement that [443] there have been inserted two new washers on one side.

Mr. Hudson: And two old ones on the other.

Mr. Splawn: And they were not there before, I think is your idea. Well, I think what I would like to have the jury do is closely inspect the bolt itself, because there is paint in the threads of the bolt, and I think if you unscrewed the nut, and I am going to offer it with the Court's permission, to unscrew those nuts, but before doing that I want the jury to see, you see, what the threads of the bolt look like before they are unscrewed, to see if there is paint in the threads, because otherwise, if we purposely took the nuts off or partially off, it would destroy any evidence that the jury would be entitled to look at in case this matter of tampering would be raised. I would want them to see if there are any signs, with their own eyes, and I will do this with you if we had a wrench of some

kind, the janitor had one, with this witness I will have him or anyone else untighten or unloosen or do whatever you want to, take those nuts off after the jury has examined the bolts before doing that, because otherwise if there is any paint in the threads it would be destroyed, and I am entitled to that, certainly; and I will have this witness or you can on your cross-examination, it makes no difference, ask him the same questions and have him demonstrate, if you will, with the nuts completely off the bolts. [444]

Mr. Hudson: Homer, I want to make a statement to you. As I have just stated, I am connected with manufacturing and am mechanically minded; that thing can be unscrewed and screwed back on, and immediately a simulation of the paint produced there.

Mr. Splawn: That is getting very fine.

Mr. Hudson: I am entitled, Homer, to show everything there is in this case, and if somebody on your side of the case has been tampering with that evidence I am entitled to show that.

The Court: Well, I see no reason why we can't, after all we have to proceed with this case, I don't want to make a career of it, I have got another jury case set for Monday and those people have rights, too. If this case goes over they will not get their case in because I have to go to Spokane on the 8th of April. Now, I think you should proceed here and you can cross-examine on the basis, if you wish, of the assumption of what you are going to contend or testify in good faith; that is,

you may hypothetically, I should think, examine the witness on the basis of the ladder being in the condition in which you claim it was at the time you inspected it, whether there would be more play or what that consequence would be, and I don't think that we should unduly prolong the case here and put it over another week or so because of the development. [445]

Mr. Splawn: What I would be willing to do, as I stated, is to have——

The Court: (Interposing) Well, there is a limit to what we can do in these cases in the way of demonstration and redemonstration, and we get ourselves into a bog the first thing you know here, where this case will have to go over until May to finish it. I don't want anything of that kind here. I think we have got this ladder, I think we should look at it as it is and let everybody testify as to the condition it was in at the time, and let the jury form their conclusion, and of course the jury will have the ladder in the jury room, and of course in argument you can point out the paint on the threads, or anything else, and they will have it in there themselves, as an exhibit in the case.

Mr. Hudson: I assume we should make no attempt to put on any testimony until rebuttal?

The Court: No, I think since, obviously, you have made a showing in good faith of what your testimony is, you should have a right to examine hypothetically on the assumption of what you claim is true. I am not precluding you from making a record in this case.

Mr. Sprawn: I wanted to be helpful in this case.

The Court: Well, yes. I appreciate your suggestions. It's unusual and an unusual situation. Sometimes [446] we get cases that run off smoothly and some don't. This is one of those things, unfortunately from my standpoint: fortunately they don't occur too often.

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CECIL C. CLARK

recalled as a witness on behalf of the defendants, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Hudson): Is the ladder, Mr. Clark, in its now condition, the same as you have seen it previously?

A. No. I think those bolts were a little looser when I looked it over at the ladder company.

Q. Now, you didn't say anything about that this morning, did you?

A. Well, I was not asked, and I was stopped when I started to make comments, so naturally I wouldn't.

Q. In other words, you didn't inspect it this morning before your testimony?

A. Yes, I did. I inspected it before court convened.

Q. And you were cognizant that they were looser when you saw it previously? [447] A. Yes.

Q. Now, would a three-sixteenths looseness between the side of the yoke and the metallic side of the ladder, would that give more play in the top part of the ladder?

(Testimony of Cecil C. Clark.)

A. Yes, it would give a little more play.

Q. And if the hole in the yoke where this small bolt comes through, if the hole in the yoke is larger than the hole in the side piece, would that give more play?

A. Yes, it's bound to give it a little more play.

Q. Now, the tighter the yoke assembly is attached to the ladder, the less play there is, is that not true.

A. That is right.

Q. You are familiar with new ladders, Mr. Clark?

A. Yes, sir.

Q. Now, in a new ladder, if you know, is the hole in the yoke, the attaching hole in the yoke, the same size as the attaching hole in the side piece on the ladder?

A. Yes.

Q. And is the bolt that connects those pieces together, the yoke with the side piece, are those of a size to fit snugly into those holes?

A. Yes, they fit fairly snug.

Q. And in a new ladder is the bolt drawn up snugly to join them together firmly?

A. Generally, although I have gotten them where they were [448] not.

Q. But, generally speaking, in the manufacture they draw these bolts up snugly?

A. They are not tight, they are up fairly close.

Q. They are not tight to the point of binding, but they are tight to the point of holding it firmly together?

A. There is sometimes a little play in them; you can wiggle them a little when they are new.

(Testimony of Cecil C. Clark.)

Q. Now, Mr. Clark, would a ladder that had a hole in the yoke for the connecting pole to the side piece which was larger, much larger than the hole in the side piece, would that tend to give more opportunity for that ladder to twist at the top?

A. No, not with a person on it.

Q. In other words, the large diameter of the hole and the looseness of the connection would make no difference?

A. Make no difference. You can take those bolts clear out of there and put a couple of sixteen penny nails in there, and you will have quite a lot of slope to it, you can set the ladder up and get it centered properly and climb right up on it and be just as safe, because your weight is all against the bearing, because when you are standing on the ladder there is no coming back, it's all just one way. You can take those bolts out of there and put two nails in and let it be as sloppy [449] as you want to and climb up on it, lay it out on the ground except—you would have to take the nails out, that is all that would be necessary.

Q. Now, Mr. Clark, you figure, you testified, you spent ten thousand hours on a ladder?

A. That is about right; maybe more.

Q. Well, would fifteen thousand be closer?

A. Well, I said ten thousand as a reasonable estimate. I have no record of it, but just going over the years and estimating the hours that I have worked on ladders, I just added up to somewhere in the neighborhood of ten thousand.

(Testimony of Cecil C. Clark.)

Q. That is a lot of hours, isn't it?

A. That is right.

Q. Now, do you feel that you have attained more dexterity on a ladder than a lady has who has picked a few days?

A. That is possible, but I still fall off of them.

Q. Then if after ten thousand hours on a ladder you fall off of them, do you think it's possible that a lady who has had a few days might not handle a ladder with the same dexterity that you do, even though you fall off of them, and she fell herself from the ladder, eh?

A. Anybody who gets careless on a ladder is liable to fall and that is why I do, because I get careless.

Q. Now, there is also a difference in the dexterity of [450] human beings, is there not?

A. Oh, I presume so.

Q. And there is a difference in the physical makeup of human beings, is there not?

A. I presume so.

Q. You are a man of fairly slight build, such as I am.

A. Well, I am not as slight as I used to be.

Q. What do you weigh now?

A. One hundred ninety.

Q. You don't have what I might refer to as too much stomach sticking out here.

A. I do.

Q. Now, a lady who is five feet tall and weighs 150 pounds with the peculiarities that are incident

(Testimony of Cecil C. Clark.)

to the feminine frame, she might have a problem that you don't have, is that correct?

A. Well, I wouldn't know. I would assume they would have different problems, yes.

Q. And all of those factors have got to be taken into consideration, do they not?

A. No, you can't take all those factors into consideration when you make and supply ladders.

Q. I am not inquiring about the making of the ladder, I am inquiring about the use of the ladder.

A. In order to use it, either one. [451]

Q. In other words, you don't consider those?

A. No, I couldn't have a ladder to suit each person's individuality and idiosyncrasies, that would be impossible. We just supply standard, usual ladders, and when the picker accepts them, the ladder, as being all right, and if there is some peculiarity about the ground and so on, we caution them about it, and we assume from there on that they know what they are doing.

Q. Now, Mr. Clark, you have been engaged in farming and agriculture and the orchard business practically all your life, haven't you?

A. That is right.

Q. Now, this ground was disked, as I understand the testimony has been that the Swier orchard was disked. Now, disks leave little furrows, do they not?

A. Well, every disk leaves a different furrow, yes, I would say.

The Court: That wasn't the question, Mr. Clark.

(Testimony of Cecil C. Clark.)

It's whether disks leave furrows; if you will answer the questions I think we might move faster.

A. Well, what is a furrow?

Q. (By Mr. Hudson): If you have been on a farm as long as you have been and you don't know what a disk is, you are not an expert.

A. I have never heard a furrow referred to from a disk. [452] Plows make furrows, disks don't.

The Court: Do you know what he is referring to?

A. They make very slight corrugations.

Q. (By Mr. Hudson): Now, this ladder was standing on a level floor, is that not true?

A. Yes.

Q. Now, there is no such thing as a level piece of orchard, is there?

A. No, sir, not exactly level, very seldom.

Q. And the disking puts in those corrugations or small furrows, whatever you want to call it?

A. Well, not sufficient to bother a ladder, no.

Q. And the ladder is set to the best of a person's ability, is that not correct?

A. That is right.

Q. But it is not set as firmly as it would be on this floor?

A. Oh, it would be much better on disked ground than this floor, because your legs would go into the ground a little bit and they would be imbedded there and be solid; on this floor they could slip a little.

(Testimony of Cecil C. Clark.)

Q. Now, you are assuming that the legs went into the ground and were imbedded and were solid. You don't know that that condition existed, do you?

A. I don't know anything about the condition out there, [453] no, sir. I am trying to answer your questions, what I know about this ladder.

Q. You are stating an ideal condition of a ladder set, and you don't know that all conditions are ideal, do you?

A. Oh, there is seldom conditions that are ideal in an orchard.

The Court: That wasn't the question.

A. I don't know what the conditions were out there, no, sir.

Mr. Hudson: I believe that is all.

The Court: Any redirect inquiry?

Redirect Examination

Q. (By Mr. Splawn): If I may, counsel is referring to dexterity, so far as this ladder is concerned, does it, in its being safe as you have indicated, does that depend upon any dexterity; in other words, when you are climbing up and down the thing do you have to be dexterous in order to make this ladder reasonably safe?

A. No, not if it is properly set up.

Q. I mean, does dexterity have anything to do with it, if it is properly set up in an orchard, is that a factor at all?

A. Dexterity might have some bearing on the

(Testimony of Cecil C. Clark.)

person's [454] setting of the ladder, but not in climbing it.

Q. Well, assuming it's set properly.

A. No, dexterity wouldn't make any difference.

Q. Then, in going up and down, or the safeness of the ladder in using it for apple picking purposes, what factor is dexterity, if any, so far as the ladder being reasonably safe?

A. Well, I don't think there would be any factor. Of course, I am not just too sure what you are including in the term "dexterity."

Q. Well, it was indicated by counsel's inquiry that a person who, let's assume, is not—

The Court: (Interposing) I don't think you should state what he has indicated. The jury has heard the testimony, just ask the questions, please.

Mr. Splawn: Thank you.

Q. Would this ladder vary in its safety as between a wiry person and a solid person, or a heavy person and a light person, or a person who could swivel easily or one who was more or less stiff, would that have anything to do with it?

A. No, except, of course, if you get too much weight, they aren't made for out-sized people exactly, but within reasonable limits on weight, it wouldn't make any difference. [455]

Q. Well, anyway, from 100 to 175 pounds or to 200 pounds?

A. Up to 250 pounds it wouldn't make any difference.

Q. It wouldn't make any difference as to the

(Testimony of Cecil C. Clark.)

character of the person being wiry or dexterous or not dexterous?

A. Unless you are including in this dexterity the thing of reaching too far. Now, I don't know whether that comes under the category.

Q. Well, that might play a part in it.

A. The thing that tips ladders is reaching too far and getting the weight off balance, getting the weight off the three point suspension.

Q. Now, so far as demonstrating this ladder or using it here, would you have any hesitancy to use it even if those nuts were unscrewed, were halfway off?

A. No, you can take the bolts clear out and, as I said a while ago, put a couple of nails in there, leaving it very sloppy, and I would have no hesitancy in setting it up in a tree to pick with it. Of course, that wouldn't be a good way to leave it because the nails might throw out, but if you left it that way you would have no trouble, because this sloppiness in that top would have no bearing on the ladder slipping. If a person could get on the ladder—you would have to demonstrate that.

Q. Would you like to get on it? [456]

The Court: Just a moment. You would have to have the permission of the Court to demonstrate that ladder, and I would like to have counsel approach the bench.

(Whereupon, counsel approached the bench.)

The Court: It seems to me now, in the present state of the record, that without any question of

(Testimony of Cecil C. Clark.)

dispute it's established that this ladder has been tampered with, that it is not in the condition that it was in the warehouse, and whatever he may say as to its not making any difference with it whether it is loose or whether it's tight, I think that is a question for the jury and I think at least until you raise a fact or issue to show that this ladder has not been tampered with, you should not demonstrate it. Of course, the thought immediately occurs to me if it is just as good loose, why was it tightened up before it was brought in here? Your own witness says that it was.

Mr. Splawn: There is also evidence that it has the same arc of play. Now he says that it was looser up there.

The Court: Well, he testifies that it was looser. I don't like the looks of this, frankly. I think there has been tampering with evidence before it was brought in.

Mr. Splawn: Why don't we have it loosened up?

The Court: I am not going to have it loosened. I will not permit you to demonstrate that ladder until you [457] raise an issue of fact that it has been tampered with.

Mr. Splawn: Well, then, I offer to have him put it in the condition in which it was.

The Court: No, I don't think he should be permitted to change that, because they have a right to have the condition as at that time. I will not permit you to change the bolts at all, that is the ruling of the Court.

(Testimony of Cecil C. Clark.)

Mr. Hudson: Yes, sir.

Mr. Splawn: So far as demonstrating with it as it is here, we could hold it and wire it, would you have any objection to that?

The Court: I don't think you should be permitted to demonstrate until you raise an issue of fact that it is in the same condition practically as it was, because you are demonstrating with a ladder which your own witness says has been tampered with.

Mr. Splawn: That is what he wants to demonstrate.

The Court: These people have a right to have it left as it is as evidence of tampering.

Mr. Splawn: Well, but I would also have the right to have him demonstrate. I will take the nuts completely off.

The Court: No, no. There has now been evidence from your own witness before this jury that the bolts and the nuts of this thing have been tightened up. Now, these [458] people have a right to have that thing kept in that condition to show the jury that it has been tampered with.

Mr. Splawn: Well, they can see it and inspect it now.

The Court: No, no.

Mr. Splawn: Then it can be put back as it was.

The Court: No, we would get into endless trouble in trying to agree on whether it had been put back. I have ruled, now go on with the case.

* * * * *

(Testimony of Cecil C. Clark.)

Recross Examination

Q. (By Mr. Splawn): With respect to your testimony concerning the safety of this ladder, would it make a particle of difference if this ladder, and I am speaking of what counsel is referring to as the bolts and nuts up at the top, if the nuts were completely taken off?

The Court: That is repetition. He has testified that if he took the bolts out and put nails in it wouldn't make any difference. Let's not repeat. Go ahead with new evidence, please. [459]

* * * * *

C. A. BRAZIL

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is C. A. Brazil? A. Yes, sir.

Q. And where do you reside? A. Selah.

Q. And what is your occupation or what are your occupations?

A. I am farming and I also operate a warehouse.

Mr. Hudson: Operate a what, sir? [460]

The Court: Warehouse.

Mr. Hudson: Thank you.

Q. (By Mr. Splawn): And what experience have you had in the fruit industry in the Yakima Valley?

A. Well, from the growing standpoint I have

(Testimony of C. A. Brazil.)

been in my own operation twelve years, this is the twelfth year, now.

Q. And what experience or familiarity have you had with ladders and the use thereof for apple-picking purposes in the Valley?

A. Well, through my own experience on my own ranch and through my contact with many growers that we service in the warehouse, I do the field work.

Q. Have you had any occasion to examine the ladder which is in the courtroom? A. Yes.

Q. Does that look like the ladder which you have looked at?

A. That looks like the ladder which I have examined, yes.

Q. And did you examine the various features of the ladder? A. Yes, I did.

Q. When you examined it? A. Yes, I did.

Q. And when you examined it, did you find a play in the tongue of the ladder at the top assembly? A. Yes, some play. [461]

Q. And with respect to that feature and every other feature of the ladder, as you found it to be in your examination—strike that question.

Q. What familiarity have you gained, if any, of ladders that are in common use in the Yakima Valley for apple-picking purposes?

A. Well, I have seen many ladders on various growers' ranches in the entire Valley and I have had occasion to borrow ladders. I have made ar-

(Testimony of C. A. Brazil.)

rangements to borrow ladders from one grower to help another grower that we service, and so on.

Q. With respect to this particular ladder, as you examined it, state whether or not in its condition it was a ladder in common use in the Yakima Valley?

A. Yes, it is.

Q. Now, with respect to the play, or looseness, at the top to which you referred and directing your attention to that feature, what effect, if any, from your experience would that have upon the safe use of the ladder for apple-picking purposes?

A. None whatsoever.

Q. Now, can you explain that?

A. It's necessary, as a matter of fact, to have some play in the top of the tongue, as I refer to it there, so that you have a free, the tongue will swing free and it [462] certainly would be much to the disadvantage of the use of the ladder if it was completely tightened, you couldn't swing your tongue out. I have seen, had occasion, on my own place to have a new ladder that was completely tight and swinging the ladder out it tightened to the place where you would almost shear the bolt off trying to force the tongue out and it is not a suitable ladder.

Q. Now, incidentally, and this is very briefly, have you held any office in a farm organization connected with the fruit industry?

A. I have held and hold office in a general farm organization which covers all commodities.

Q. I see, and what organization is that?

A. That is the Farm Bureau, both the Yakima

(Testimony of C. A. Brazil.)

County and the Washington State Farm Bureau.

Q. And what offices, if any, have you held in those two organizations?

A. I have served as Chairman of the Yakima County Fruit Committee; I have served as Chairman of the Yakima County Marketing Committee; I have served as President of the Yakima County Farm Bureau, and I am at present a State Director of the Washington State Farm Bureau.

Q. Now, with respect to the particular ladder, if a person climbs up the ladder and completely to the top and the [463] ladder is properly set, can there be any effect by reason of the play, or looseness, which I have referred to, to cause the ladder to tip or collapse or to go in any direction?

A. If the ladder is properly set and properly used, I can't see any reason why it should tip.

Q. And does the amount of looseness play any part in that? A. None whatsoever.

Q. If the ladder were properly set, and let us assume on disked ground, and a person climbed up or was on the eighth rung from the bottom and was standing on the eighth rung and not reaching out to pick with a bag about half full of apples and turned and with both feet on that rung slightly to the right to ease off the pressure of the bag against the frame of the ladder, can you think of any conceivable way that that ladder could tip over under those circumstances?

A. I don't see how it could be tipped over if it is properly set.

(Testimony of C. A. Brazil.)

Q. What does it take, from your experience, if the ladder is properly set and with the amount of looseness, or play, or even a greater amount, what would necessarily have to take place for that ladder to tip over?

A. Well, probably, the most probable thing that might happen would be to reach out beyond the reach of the person [464] on the ladder. In other words, to attempt to stretch out to a point where the weight of the body is way off the center of the ladder, if you know what I mean there.

Q. I see. Now, so far as a person's dexterity is concerned, is that any factor so far as the ladder is concerned, if it is properly set, other than reaching out, for example, and being able to reach out to pick apples, is a person's dexterity, is that any factor in the safety of this particular ladder?

A. No, no.

Q. In other words, would the safeness of the ladder vary with the build of the pickers using it?

A. No.

Q. Did I ask you the question as to whether or not that ladder and in the condition that it was when you examined it was or was not a ladder in common use in the Yakima Valley, I don't think I asked that question, did I, your Honor?

The Court: I am not sure, he may answer it, anyway.

A. That ladder is a ladder which is in very common use in the Valley.

Mr. Splawn: That is all.

(Testimony of C. A. Brazil.)

Cross Examination

Q. (By Mr. Hudson): Mr. Brazil, referring to the yoke, the holes on the yoke [465] assembly on the side plates which the little bolt goes through?

A. I am not sure that I quite follow you, sir.

Q. Those little bolts right up there that go through the side plate on the ladder and the yoke assembly?

A. Oh, yes.

Q. Those holes in manufacture are the same size, are they not?

A. I didn't quite understand, sir.

Q. Those holes on those two pieces, they are the same size, are they not, between the yoke and the side plate?

A. The holes in that plate?

Q. Yes. A. Yes.

Q. Those are the same size?

A. You mean, on either side, sir?

Q. Yes. A. Yes.

Q. Well, and the holes in the yoke, also, the side of the yoke?

A. Oh, where it matches up? Yes, sir.

Q. Those are the same size? A. Yes.

Q. And the yoke bolts in the yoke here are a bolt that fits snugly in those holes, am I correct? [466]

A. The bolt that is commonly used is one that slips easily through the hole, yes.

Q. Yes, and the bolt is tightened up, and not to the point of snugness in manufacturing, just so it won't bind, is that correct? A. That is right.

Q. Now, Mr. Brazil, would the fact that the bolt hole in the yoke was much larger than the hole in

(Testimony of C. A. Brazil.)

the side plate and much larger than the connecting bolt, that would give additional play to the yoke assembly? A. Would you repeat that?

(Last question read.)

A. It would be very little, if any.

Q. In other words, the fact that a small bolt goes through a big hole, that wouldn't make any difference in the play, is that right?

A. It would make some difference in the play, I would imagine, yes.

Q. It would make a lot of difference, wouldn't it, am I right?

A. Well, depending on the size of the bolt, I would say, would determine.

Q. Now, let us assume this: that if the bolt going through there is a three-sixteenths bolt and the hole in the yoke assembly is three-sixteenths larger than the bolt, [467] it would give a lot of play there, wouldn't it? A. Yes, it would.

Q. And if this question is unfair, you say so: now, can you tell me how much the three-sixteenths play up there, how big it would be down at the foot of the tongue?

A. I am afraid I couldn't very well answer that; that is very true, sir.

Q. Now, let's enlarge that this way: let's assume that the yoke instead of being pulled firmly up to the side plate, that there is a three-sixteenths play in the yoke between the yoke and the side plate with a three-sixteenths bolt going into the yoke that

(Testimony of C. A. Brazil.)

has three-sixteenths play, that would, also, give that much more room for play, would it not?

A. Well, I would think it would give, depending on the condition of the bolt and so on, yes, it is hard to determine how much.

Q. Now, if that yoke assembly is loose, as I have described to you, doesn't that give more opportunity for the top of that ladder to twist and become unbalanced? A. No.

Q. That wouldn't affect it? A. No, sir.

Q. The fact that you have got a little bolt going through a big hole doesn't make any difference?

A. That doesn't make any difference.

Q. And the fact that you had a big hole in the yoke assembly and it wasn't tightened up there wouldn't make any difference? A. No.

Q. None at all?

A. No, I wouldn't hesitate to use the ladder.

Mr. Hudson: That is all. The answer, too, I move to strike that, if the Court please, as being not responsive.

The Court: Yes, it wasn't responsive, and I grant the motion to strike it. All right, go ahead.

Redirect Examination

Q. (By Mr. Splawn): With respect to the ladders in ordinary use in the Valley, and you stated that you had familiarity with ladders in ordinary use in the Valley, the looseness, such as you found to exist, was that unusual? A. No.

Q. And when you say that that looseness, such

(Testimony of C. A. Brazil.)

as counsel referred to, would have no effect, how do you explain that?

A. If the ladder is properly set and the tongue is straight forward on the ladder when it is being used, whatever that play in that, I refer to it as the "hinge," that is [469] a way of referring to that yoke, as the gentleman calls it, has no effect upon the twisting or the moving of the ladder.

Q. For example, a brand new ladder that has never been used and is absolutely rigid at the top, that is, so far as its connection with the yoke, as Mr. Hudson calls it, can you set that out on a floor such as this, or any surface, and press in on one leg and cramp it, or put it into a torque?

A. Oh, yes, yes.

Q. Can you do that just as easily with a new ladder as you can with a used one?

A. Yes, a wood ladder will twist, if you set it in an improper position you can stand there and just push on it.

Q. I am speaking with no weight on it.

A. You can push it.

Q. Any wood ladder? A. Yes.

Q. New or used? A. That is true.

Q. And one just as well as the other, is that right? A. Yes.

Mr. Splawn: That is all. [470]

Recross Examination

Q. (By Mr. Hudson): Now, Mr. Brazil, you have qualified here as an expert, if, and I will adopt

(Testimony of C. A. Brazil.)

your word "hinge," if an extremely loose hinge is beneficial to the operation of the ladder why don't the manufacturers make them that way?

A. I don't believe, sir, that I said it was beneficial to the ladder, I said it didn't detract from the safety of the ladder.

Q. Now, you testified that ladders in this general condition are in common use in the Valley?

A. Yes, sir.

Q. Now, how do you know they are?

A. I have seen quite a few hundred, sir, maybe in the thousands, I wouldn't know.

Q. You didn't see them, Mr. Brazil, you observed them off to the distance, didn't you?

A. No, sir, I have carried ladders, I have repaired ladders, I have used ladders.

Q. Have you inspected that hinge, did you inspect it previously?

A. If that is the ladder that I looked at, yes.

Q. And are all ladders that you say are in common use here in the Valley, are their hinges in that condition?

A. I would say that most of them are, a new ladder just [471] coming out would not be that loose.

Q. You are sure about that now, Mr. Brazil?

A. Yes, sir. [472]

* * * * *

BEN HOVDE

called and sworn as a witness on behalf of the defendants, testified as follows: [473]

Direct Examination

Q. (By Mr. Splawn): Your name is Ben Hovde? A. That is right.

Q. And where do you reside?

A. Route 2, Selah.

Q. And what is your occupation?

A. I am a fruit rancher.

Q. And how long have you been a fruit rancher?

A. Since 1941.

Q. What experience have you had with ladders and how ladders operate?

A. Well, I have used them, I used to pick apples when I first came in the Valley, that was in '29 and the '30's, and used to go out on Sundays and pick for different farmers. I have my own ladders, which is about twenty. I have, also, borrowed ladders from neighbors, so I have had quite a bit of experience in handling ladders.

Q. Have you gained, during the course of your career as a fruit rancher, a familiarity with ladders that are in common use in the Yakima Valley for apple-picking purposes? A. I have.

Q. Does that encompass the period of 1955?

A. Yes. [474]

Q. Briefly, what offices or directorships have you held in agricultural organizations?

A. Well, I was President of the Yakima County Farm Bureau for two years. I have served on the

(Testimony of Ben Hovde.)

State Board of Directors for the State Farm Bureau. I am at present the State Organization Director. I have helped in setting up the bargaining association for pears here in the Yakima Valley; served as Chairman of a group in Selah to get the Selah area organized.

Q. Have you observed a ladder in the courtroom? A. Well, I see it, now.

Mr. Hudson: Now, that wasn't quite the question, he asked if he had observed it before.

Q. (By Mr. Splawn): No, I should say: do you observe a ladder in the courtroom? A. Yes.

Q. And that ladder, for your information, is marked Defendants' Exhibit 1, I believe, and it has been further identified as a ladder belonging to one Walter Swier. Now, have you examined that ladder at any time previously?

A. I examined that ladder at Dependable Ladder Company in their warehouse.

Q. I see, and what kind of examination or testing, if any, did you make of that ladder? [475]

A. Well, I just reclined it to see if there was any sway in the ladder. I found it to be in good condition.

Q. Did you observe a play, or looseness, in the top assembly where the tongue fits on to the platform at the top?

Mr. Hudson: If the Court please, I question very seriously whether a man who uses twenty ladders could qualify as an expert, but I see no point

(Testimony of Ben Hovde.)

in raising the objection because if it was sustained it would just take that much more time.

The Court: All right, the record will show an objection. I will have the record show an objection on all of them, you need not repeat it, if the circumstances are similar with these witnesses.

Mr. Hudson: Yes.

Q. (By Mr. Splawn): In your examination or testing of the particular ladder as you have indicated, did you find a looseness or play at the top where the tongue assembly fits into the top part of the ladder?

A. Just the regular play that a ladder would have in average use.

Q. I see, and did you examine the ladder otherwise? A. Pretty much, yes.

Q. And I will ask you this question: as you found the ladder, what would you say as to its being, including all conditions, in common use in the Yakima Valley? [476]

A. I would say it's average or above average.

Q. Now, with respect to looseness at the top, if the ladder is set properly, what effect, if any, can the looseness or any amount of looseness have upon the stability or safety of the ladder?

A. Well, I can't see that it would have any. It's absolutely a normal ladder, what most all the farmers use. It's good and solid.

Q. If one were standing on the eighth rung and the ladder were set properly and the person standing on the eighth rung was not lifting a foot down

(Testimony of Ben Hovde.)

or up, but standing on the eighth rung with a picking bag half full of apples and turned slightly the body to the right to ease off the pressure of the bag against the frame of the ladder with both feet still on the eighth rung, is there any way that that looseness at the top or play or any amount of looseness at the top would have any effect so as to cause the ladder to tip over or sway or collapse?

A. I can't see any.

Q. If the ladder were set properly, what would it take, in your experience to cause it to tip over?

A. Well, I would say that if it was set properly, unless you leaned over too far, why, it shouldn't tip over.

Mr. Splawn: That is all. [477]

Cross Examination

Q. (By Mr. Hudson): Do you pronounce that "Huv-dee"? A. "Huv-dee."

Q. Would the fact that there were longitudinal splits coming down the side leg, the right side leg from the top platform, mean anything to you?

A. No, it wouldn't.

Q. It is just as good as though the splits weren't there?

A. That is right, it's practically as good.

Q. It doesn't affect the strength of the wood in any way?

A. Well, I can't see where it would affect it to the point where the ladder would fall over.

Q. I didn't ask you whether it would fall over,

(Testimony of Ben Hovde.)

I asked you whether it would affect the strength?

A. It wouldn't affect the strength.

Q. You would buy a ladder with split legs, would you?

A. Oh, no, not unless it was new, no, but the drying of the wood would have some effect in cracking.

Q. You don't think the splitting of the legs there would affect it so it would twist?

A. No, I don't. As a matter of fact, I would be willing to climb the ladder any time.

Q. So will I, right on that floor.

A. So will I, any place you want to put it. [478]

Q. Are you sure it wouldn't bother you? Now, of course, you have qualified yourself as an expert here, and you say that that ladder is in the condition of all ladders of a similar nature in common use throughout the Valley, is that correct?

A. Yes, I would say that.

Q. Now, you don't know whether that is true or not, do you?

A. Pretty much, I have observed.

Q. Are you sure? A. Sure.

Q. Now, I want to get the nomenclature of this understood between you and me, that top part, do you refer to that as a hinge or a yoke?

A. Well, I would refer to it as a hinge, that is the way I would qualify it.

Q. All right, now, those ladders when they are manufactured, the hole going through the side of

(Testimony of Ben Hovde.)

the hinge and through the side plate on the ladder are the same size, are they not?

A. I suppose, presumably, so, practically.

Q. And they have a hole going through there that the bolt will go through snug?

A. That is right.

Q. Now, when that ladder is assembled that bolt is screwed up so that they are held together snugly without binding, [479] right? A. Right.

Q. Now, if the hole in the tongue part of the hinge was three-sixteenths of an inch larger than the hole in the side plate on the leg, would you say that all the ladders in the Valley are the same way?

A. I wouldn't say they all would be, but I think it would fall within the average, because there is bound to be a little wear as time goes on.

Q. Well, how do you think they got that way?

A. What is that?

Q. How do you think they got that way?

A. By usage.

Q. Do you think that they will wear a hole that big? A. By usage, surely.

Q. But you don't think that the hole was made that big?

A. Well, when the hole is made, why, it's built for a certain bolt; there is a little play even then.

Q. You don't know that that is the same hinge that was on there, do you, the same tongue part?

A. Well, I would have to examine it a little closer, I can tell you pretty close.

(Testimony of Ben Hovde.)

Q. I thought you said you did examine it?

A. I have examined it there, but I haven't examined it here.

Q. Do you think it has been changed? [480]

A. I wouldn't see any reason for it.

Q. But you have testified that they are all the same way, now; if you will assume this set of facts, Mr. Hovde: that the hole in the tongue part of the hinge is three-sixteenths of an inch larger than the bolt going through and that there is three-sixteenths of an inch play between the tongue side of the hinge and the side plate, would you say that those combined factors would make that top looser?

A. With weight on there, I don't think it would make much difference.

Q. Now, if it had been testified that in respect to ladders that had been tight and you found three-sixteenths of an inch play on either side of the tongue side of the hinge, would you think that they had been tightened?

A. Will you repeat that question again, please?

Q. If there was testimony that before those ladders were put out that everything had been tightened, would you think that if there was three-sixteenths of an inch play lateral-wise between the tongue side of the hinge and the ladder like side of the hinge that they had been tightened?

A. You mean, now?

Q. No, before they were used in 1955?

A. Well, I would think that they had been, perhaps, checked [481] on and found to be safe

(Testimony of Ben Hovde.)

equipment. It isn't necessary to tighten those bolts up there. I wouldn't think, as long as their nuts are on in good shape.

Q. In other words, if you wanted to tighten them up, why, you would bring it up to three-sixteenths of an inch and stop?

A. Most of those we just leave those pretty much as they are because if you twist on them you could break them.

Q. And you don't think that the looseness that I have described in this hypothetical case would have any effect on the ladder twisting?

A. No, I do not.

Q. You don't think it would have?

A. I absolutely do not.

Q. You don't think it would have any effect to take a twist at all?

A. I absolutely do not.

Q. And you don't think that looseness there would have an effect of twisting, I am going to say, a twist to the right or a twist to the right and raise that left leg and tip it?

A. No, that would not have anything to do with it. The more rigid the ladder is the easier it is to tip. I can take you out and show you an aluminum ladder that will tip much easier than a wood with little play. [482]

Q. We are not discussing aluminum ladders, were we? A. No.

Q. We are discussing this one?

A. That is right.

(Testimony of Ben Hovde.)

Q. And if this looseness that I have described, if that was beneficial to the operation and safety of the ladder, don't you suppose the manufacturer would make them that way?

A. Well, he makes them within reason, he uses the bolts, they tighten them up to where they feel they should be, but they are bound to get a little play when they are in use. Any piece of equipment will loosen up.

Q. You have got to have a little play?

A. Yes.

Q. But that is all the play you want in it, isn't it?

A. Well, that might be all the manufacturer would care to have, but farmers, why, they have a little more when they have them in use a year or two.

Q. Why, yes, they have a little more, but then all they do is have the tongue swing back and forth?

A. They have the tongue swing back and forth.

Q. They don't go in and enlarge the hole there so it will go up and down this way (indicating)?

A. No, they don't enlarge the hole up and down. What?

Q. They don't go in and enlarge the hole there so it will [483] go up and down this way (indicating)?

A. No, that comes by wear.

Q. And they don't loosen the bolt so it has got lateral play, do they?

A. No.

Mr. Hudson: That is all.

(Testimony of Ben Hovde.)

Redirect Examination

Q. (By Mr. Splawn): Mr. Hovde, looking at the top of that ladder and if the nuts were taken off entirely and aside from the fact that the bolts might eventually fall out because there would be no nuts on them, if you took off the nuts entirely on those two bolts up at the top, do you know what bolts I am talking about? A. Yes.

Q. Would that make any difference as far as the stability of the ladder was concerned if it were properly set?

A. As long as the bolts are in there, I would think that the ladder would still stand up under proper setting. [484]

* * * * *

WALTER SWIER

the defendant, recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): In the year 1955, when did Mr. and Mrs. Wong come to your place to live?

A. Oh, I don't know definitely, I would say June or July.

Q. And prior to that time had you had on your place any other members of the Wong family?

A. Yes, about two years previous the elder boy stayed with us for the summer.

Q. And did anyone else in the family stay with

(Testimony of Walter Swier.)

you prior to the parents coming there to live in June or July of 1955?

A. Well, in the fall of '54 the boy and the two elder girls came to our place to live with us, presumably for a couple of years.

Q. And when Mr. and Mrs. Wong arrived in the summer of 1955 or at the time that you have indicated, where did they stay on your place?

A. In a small adjoining tenant house on the premises. [485]

Q. And they continued to reside there for up to what time?

A. Oh, until about June, I think, of '56; I don't remember definitely, it's on the record, I am not good at dates.

Q. When they came what employment, if any, did you furnish either Mr. or Mrs. Wong?

A. Well, they both picked pears, oh, approximately the first of September, for approximately a week, and he also had picked cherries during cherry season, and the boy and he put in a few days, perhaps, at thinning, and some propping.

Q. Did Mrs. Wong pick pears for you?

A. Yes, sir.

Q. That fall? And during the course of pear picking did she use a ladder, do you know?

A. Certainly.

Q. I see, and did she operate on her rows or did she work for her husband, or what do you recall in that respect?

(Testimony of Walter Swier.)

A. Well, oh, as I recall they picked together a row.

Q. And so far as her handling the ladder which she had during that picking, what did you observe about that, if you observed anything?

A. Well, the man usually takes the taller ladder and the woman the shorter one, and she handled her own ladder, as far as I could ascertain.

Q. I see. Now, when next did she do any work for you after [486] pear picking?

A. Oh, there was an intermission of approximately a month before apple season.

Q. During the pear picking did she or anyone else indicate to you anything concerning her lack of knowledge concerning picking or the handling of a ladder?

A. Oh, I don't know just how to answer that. We brought the ladders out and the bags and instructed them how to pick, which is normal procedure, and they are people of normal intelligence and they picked pears.

Q. Well, was any complaint or thing brought to your attention by either Mr. or Mrs. Wong about her lack of knowledge as to how to go about picking, or to handle a ladder?

A. No, sir.

Q. When apple picking commenced, and I am speaking of the fall of 1955, what was done, as you know, about furnishing the Wongs ladders with which to pick?

A. Well, they were furnished four ladders, for

(Testimony of Walter Swier.)

Mr. and Mrs. Wong and two of the children that picked after school, and during vacation.

Q. I see, and was there any change of those ladders? A. None.

Q. Now, it was testified that apple picking began either the latter part of the first week in October or the [487] first part of the following week, is that approximately correct, as you recall?

A. Yes, sir. We had been picking about eight or ten days at the time of the incident.

Q. And the incident to which you refer occurred on what date? A. October 17.

Q. Now, during this interval of time from the commencement of apple picking to the date of the accident, did Mrs. Wong work every day?

A. To the best of my knowledge, yes.

Q. I see. And what about the use of her ladder, as far as that was concerned, did she, like in pear picking, handle her own ladder and make her own sets? A. Yes, sir.

Q. At any time during the course of apple picking did she or anyone else ever express to you in any manner anything about having any trouble with her ladder or having any trouble in using it to pick apples, for any reason? A. No, sir.

Q. Referring to Defendants' Exhibit 1, which is the ladder in question, was that the ladder, so far as you know, that she used? A. Yes, sir.

Q. When did you, or where were you when you first learned [488] that Mrs. Wong had had an accident?

(Testimony of Walter Swier.)

A. Oh, the place has a sort of a pasture running east and west, the orchard we had been picking was to the south, and the present orchard, as of that morning, was to the north of this pasture, and I was loading on the south side of the place when I heard some screaming and calling for help and my name called.

Q. Were you the first to arrive at the scene of the accident? A. No, sir.

Q. Who had arrived there before you, if you know?

A. Well, she was picking with her husband and son and daughter, taking two rows parallel, and my son was picking at an adjacent row, and also one other picker by the name of Sam Dart; these six were picking that day.

Q. Does he live around here somewhere?

A. No, sir.

Q. What variety of apples were being picked or what variety was being picked at that time or that Mrs. Wong was picking?

A. Delicious.

Q. And were these old trees or young trees, or about what age of trees were they?

A. Well, I call it my young orchard because the trees are smaller and they discarded all their twelve foot ladders [489] and a ten foot ladder would amply pick them.

Q. And was that true of the tree at which Mrs. Wong sustained her accident? A. Yes, sir.

(Testimony of Walter Swier.)

Q. Incidentally, as the pickers picked their apples, how do they stack them in the orchard?

A. Oh, it depends on the picker.

Q. I see. Were there any apples stacked in the orchard three high?

A. Yes, sir, that was common practice. It takes less space on the ground and, well, I am a little selfish in that, perhaps, I don't need to level boxes, I would rather heap them, and also it conserves space for there is more room for the pickers to work.

Q. During the period of time that Mr. and Mrs. Wong were at your place from June or July of that summer, where did the three elder children which you had previously had stay?

A. What is that?

(Last question read.)

A. Well, that is a sort of a mixed question. The house was rather small that they moved into and the children had spent the winter and the early part of the summer with us and, well, we have a large, rambling house there, an old-style country house, so they kept their rooms [490] upstairs but they would go during the day with their parents, and ate with them, they slept in our house is what I am trying to say.

Q. Just generally speaking, through what connection did you folks become acquainted with the Wongs?

A. Oh, through religious organizations.

* * * * *

(Testimony of Walter Swier.)

Q. If you know, I don't know whether you know or not, Walter, but I am going to ask you the question: do you know what earnings or what they earned, other than what [491] you paid them at your place, were they doing anything other than that from which they derived any income of which you know?

The Court: Now, pardon me, I think that the witness should answer that from his own personal knowledge of what they received or from statements which they made to him, one or the other, and not from hearsay.

Q. (By Mr. Splawn): Yes, from what they have mentioned to you or what you knew otherwise of your own personal knowledge, I meant to say that.

The Court: Yes.

Mr. Splawn: Thank you.

A. I cannot state in terms of dollars, all I know is in work.

Q. (By Mr. Splawn): Did they make any statements to you concerning their earnings or being able to get along financially?

A. Well, I do know that it is the press of circumstances that caused them to come to our place.

Q. Were those financial circumstances?

A. Yes, sir.

Q. Did they pay you anything for rent for their quarters on your place?

A. No, sir, that was never asked or suggested.

Q. I see. So far as the care of the three elder

(Testimony of Walter Swier.)

children [492] before they came, did you receive any compensation for that; if so, how much?

A. Well, I did not and I didn't ask for it. I didn't expect it, my wife was given some once.

Q. I see. A. Personally, I did not.

Q. Now, the place or the tree where the accident happened, what was the area there like, so far as being level is concerned?

A. Oh, it was about as nearly level as an irrigated farm could be.

Q. And this was an irrigated farm?

A. Yes, sir.

Q. And it has been testified that the ground was disked at the place where the ladder was set when the fall occurred, is that correct?

A. That is correct.

Q. Now, your ditches ran in what direction?

A. Well, the ditches ran north and south.

Q. I see, and the picking was done in what direction, that is, following the trees?

A. Well, the orchard has fillers and the place is set out rather peculiarly in the form of a parallelogram, so I run my spraying and hauling at a, well, shall I say a bias; in other words, these rows were southeast and [493] northwest.

Q. Then a picking row did not coincide with a ditch row? A. No, sir.

Q. You were there, I take it, when Mrs. Wong was taken to the hospital?

A. I arrived there shortly after. I heard the call for help and so I made arrangements to get

(Testimony of Walter Swier.)

her out of the orchard and I myself put on, tied on the splint on the limb.

Q. Was your son, David, there to assist you with that? A. He was there before I was.

Q. I see, and you were there when she left by ambulance, I assume? A. Yes, sir.

Q. For the hospital. Now, you didn't see her fall? A. No, sir.

Q. Do you know of anyone who actually saw her fall?

A. No, I don't actually know of anybody that saw the fall.

Q. I see, so you can't offer anything about that because you don't know? A. No, sir.

Q. Was the ladder broken in any way?

A. Well, this is the ladder.

Q. Yes. Now, after the date of the accident did you ever inquire from Mrs. Wong as to what had happened? [494]

A. I did after she returned from the hospital.

Q. And that would have been——

A. Sometime after the 13th of December.

Q. I see. And where did she go when she returned?

A. To the same tenant house where they had been living. The husband and the children all resided there while she was in the hospital.

Q. Do you remember what you asked her or what you did so far as trying to learn what had happened?

A. Oh, you will recall that was the winter of

(Testimony of Walter Swier.)

a very deep snow, and she was unable to move around, so we used to, oh, visit perhaps almost daily and chat, and when she was somewhat recovered I asked her one day, I said, "Rose, what in the world brought on your fall?"

Mr. Hudson: Now, if the Court please, before we go into that conversation I would like to have the time and place and who was there.

The Court: Yes, counsel is entitled to have that.

Q. (By Mr. Splawn): Is that the tenant house, or at your house? A. In the tenant house.

Q. I see. And it was after she returned from the hospital?

The Court: Pardon me, Mr. Splawn, I think the witness should fix the time as near as he can, and who was present. [495]

Mr. Splawn: Pardon me, I see.

Q. Do you know the date?

A. Not definitely.

Q. What would be the best way that you can express the date or the period of time by the month or the week?

A. Oh, I would say in the latter part of the month of December.

Q. And do you have any recollection concerning the time of day?

A. It was in the morning, perhaps ten or eleven o'clock.

Q. Do you remember who was present when you inquired of her and she gave any explanation?

A. That particular day?

(Testimony of Walter Swier.)

Q. Yes.

A. Oh, my wife was there, and her husband, and the two small pre-school children.

Q. And you asked her what you just stated?

A. That is right.

Q. Walter, what did Mrs. Wong tell you?

A. Well, she said she didn't know definitely, but as near as she could remember, she had reached out for some apples as she was about to finish the tree, and she was up about five or six steps and was coming down.

Q. Did she indicate about what step she was when she fell or something happened to get her off the ladder? [496]

A. Well, she said she wasn't definitely sure but she thought it was about the fourth step.

Q. I see. Did she indicate, then, what she struck her leg on; do you remember her indicating anything of that nature?

A. Well, that was common knowledge, she knew.

Q. Well, what was it?

A. The corner of a box of apples.

Mr. Hudson: Now, if the Court please, I am not particularly concerned about what was common knowledge and his statement, if she knew. If she stated, well, let's just have her testimony.

The Court: Yes, I think that should be stricken and the jury instructed to disregard it, that it was common knowledge and that she knew. You may state what she said

Mr. Splawn: Yes, thank you.

(Testimony of Walter Swier.)

Q. What did she say in that respect, as you remember, if she did indicate or say anything about what her leg struck?

A. Well, she fell and she said she struck her leg on the edge of a box.

Q. It was testified yesterday, I believe, when you were up here yesterday—

A. Yes.

Q. (Continuing) —by Mrs. Wong that one time in that [497] winter you went out with Mr. Wong to where the ladder was?

A. Yes, sir.

Q. Did you?

A. I did.

Q. And tell us about that occasion.

A. Well, I wanted to look at the ladder and I wanted him to see it; it was in the shed on the place.

Q. And did you go out there with him?

A. I did.

Q. And did you show him the ladder?

A. I did.

Q. And did he inspect it?

A. Well, I showed him the movement in the tongue.

Mr. Hudson: If the Court please, I don't want to be objecting all the time, if counsel would let the witness testify instead of asking questions that require only a yes or no answer.

Mr. Splawn: I'm sorry, I will try to accommodate counsel.

The Court: I think you have been leading.

Q. (By Mr. Splawn): Well, what took place out there?

A. Sir?

(Testimony of Walter Swier.)

The Court: It isn't accommodating counsel, that is what you are supposed to do. [498]

Mr. Splawn: Yes, all right, thank you.

The Court: All right.

A. I moved the tongue of the ladder.

Q. (By Mr. Splawn): Did it have a play?

A. Yes, sir.

Q. And like it has now?

Mr. Hudson: Now, just a moment.

The Court: You are leading again. Why don't you let the witness testify.

Mr. Splawn: I am sorry, I will withdraw the question.

Q. And is that play, how would you describe it so far as the ladder is concerned?

A. Oh, I would say it had a play of about three inches one way and four the other, from center.

The Court: Pardon me, just to make it clear, do you mean that the bottom of the tongue or third leg there had three or four inches play?

A. No, I mean, your Honor, if you lay the ladder back so that the tongue was on the ladder on top and put it in.

Q. (By Mr. Splawn): You would move it about three inches one way and four the other?

The Court: Would that be at the bottom of the tongue? A. Yes, sir. [499]

The Court: Well, that is what I wanted. All right, go ahead.

Q. (By Mr. Splawn): And then where did you go?

(Testimony of Walter Swier.)

A. Oh, as I recall, we went back to the cabin where Mrs. Wong was.

Q. And did you hear Mrs. Wong's testimony about what you did at that time?

A. Yes. She had sort of a drawing, a diagram, as I recall, on the back of a, oh, one of these bargain sheets for groceries.

Q. Yes, did you do anything like that?

A. I do not recall it if I did.

Q. Do you remember Mrs. Wong saying, Walter, that at that time you told her that the ladder was defective? A. No, I do not, I admitted play.

Q. What?

A. I admitted play in the tongue of the ladder.

Q. Did you ever characterize that to anyone as being a defect or something wrong about the ladder?

Mr. Hudson: Now, if the Court please, here we have got the question and there is only one possible answer, "Did you ever admit to anyone that that play was a defect in the ladder?" Your Honor, it's testimony from counsel and it is prejudicial to this jury.

Mr. Splawn: If your Honor please, there was [500] testimony by the plaintiff as to that and, of course, in rebuttal of that I would have the right to direct the witness' attention to that testimony and ask him, because that was already testified in their case in chief, so it would not be leading such as counsel suggests.

(Testimony of Walter Swier.)

Mr. Hudson: Let's have the reporter read the question.

(Last question read.)

The Court: Well, I think you should ask him whether or not she did say.

Mr. Splawn: Of course, he said "defect" and I was just asking about it.

The Court: I will permit it to stand. I wish you would refrain from leading as much as you can.

Mr. Splawn: Thank you.

A. I admitted looseness.

Q. (By Mr. Splawn): Well, will you answer my question: did you say that that was a defect or something wrong?

The Court: Now, I think that is leading. Did you ever say anything about it being a defect, was that ever discussed by you?

A. I do not recollect it being used, that word.

The Court: All right, go ahead.

Mr. Hudson: If the Court please, I believe his answer of that question was that he described it as a looseness, [501] not a defect.

Mr. Splawn: Yes, that is correct.

The Court: Yes.

Q. (By Mr. Splawn): Did Mrs. Wong or Mr. Wong during that winter and after the date of the accident ever have any conversation with you claiming anything to have been wrong about the ladder, or anything of that kind?

A. No, they made no claims, to my knowledge.

(Testimony of Walter Swier.)

Q. What is that?

A. They made no claims of such, to my knowledge.

Mr. Splawn: I see.

Mr. Hudson: What is the date of this?

Mr. Splawn: I will say after the date of the accident, following the date of the accident.

Q. When, as you recall, was the first occasion that the Wongs asserted a claim against you for something wrong?

A. Oh, I wouldn't remember as to dates, but I had knowledge of it sometime before the papers were served.

Q. How long before?

Mr. Hudson: Now, if the Court please, I think that is wholly irrelevant as to when they knew somebody was going to make a claim against them.

Mr. Splawn: Oh, it has some materiality and relevancy.

Mr. Hudson: What is it material to in this case? There is no materiality. It's incompetent, it's irrelevant.

Mr. Splawn: It's some evidence as to whether or not they actually bonafidely felt they had a claim, the length of time was so normal, if they felt they had a claim to permit them to bring an action.

The Court: I will permit him to answer.

Q. (By Mr. Splawn): How long before the suit was actually served on you, Walter, was there any indication, or what were the circumstances, or what was said?

(Testimony of Walter Swier.)

A. Oh. I recall of one occasion when I was asked if we would have any. I don't know the exact words, but if we had any ill-feeling about a friendly claim.

Q. That wasn't in the form of a question?

A. That is right, pressed against us.

Mr. Hudson: When was this?

A. Oh, some weeks before the claim was filed. I wouldn't know exactly when. I didn't keep dates.

Q. (By Mr. Splawn): And when was the suit filed against you, Walter?

A. Frankly, I don't remember.

Q. I see. Well, the record would show that. What was that in connection with, if you know?

Mr. Hudson: What was what in connection with?

Mr. Splawn: Well, their coming, this statement that he has testified to. [503]

Q. Was anyone else there, or how did it come out, or anything that surrounded that transaction?

A. Yes, Miss Loveland was there.

Q. And who is she? That is Mrs. Wong's sister?

A. That is right.

Q. I think that has been mentioned. Now, so far as your experience is concerned in orcharding, Walter, what has been your experience?

A. Oh, practically a lifetime at it, since about 1918.

Q. And in what areas?

A. Well, in the Moxee area, and around Wapato, and then in the last three or four years at the present location.

(Testimony of Walter Swier.)

Q. Are all those locations in the Yakima Valley?

A. Yes, sir.

Q. And at your Cowiche place, is that the only place you have? A. Yes, sir.

Q. And what experience, Walter, have you had with ladders and the use of ladders and how ladders work?

A. Oh, during the years I perhaps have owned hundreds of them. I have done a lot of picking myself, I have exchanged work, and I have borrowed ladders and loaned them.

Q. So far as your community up there around Cowiche is concerned, in your experience have you gained any [504] familiarity with ladders that are in common use among the orchardists?

A. Certainly.

Q. Well, so far as this particular ladder is concerned, on the date of the accident, and with all the features that the ladder had including the looseness and play that you testified you showed Mr. Wong, what would you say as to the ladder being one that was in common and ordinary use in the community?

Mr. Hudson: Just a minute, I object to that question, not that he might not be qualified to state, but from the standpoint of the defendant here the answer to that question can only be a self-serving statement, and I object to him answering it.

The Court: Overruled, he may answer.

A. Well, as to variety or brand of ladders, it's the only ladder which the Co-operative of which I

(Testimony of Walter Swier.)

am a part handles. It's the only brand they have handled for years, and as to its condition, I would say it's average or better than average.

Q. (By Mr. Splawn): And do you include in that this looseness and play to which you referred?

A. Yes, I wouldn't be afraid to go out and work with it today.

Q. Would your statement be any different on the date of [505] the accident? A. No, sir.

* * * * * [506]

HERBERT ROSSOW

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is Herb Rossow? A. Right.

Q. And where do you live?

A. 1119 Queen.

Q. And what is your business?

A. I own and operate the Dependable Ladder Shop.

Q. And that has been from what date?

A. Since the first of January of this year.

Q. Prior to that time, what was your occupation?

A. I was shop foreman in the shop down there for five years.

Q. At Dependable Ladder Company? [507]

A. Right.

(Testimony of Herbert Rossow.)

Q. And where is that located?

A. At 2402 Fruitvale Boulevard.

Q. And in what city is that? A. Yakima.

Q. What is the nature of your business?

A. Manufacturing orchard ladders and stepladders and all kinds of ladders.

Q. And in addition to that, what do you do at your plant?

A. We have the agency for the Crawford door.

Q. I mean, so far as ladders are concerned?

A. We repair ladders, make all of the parts for our ladders, and repair the different growers' ladders that is brought in for repair.

Q. During the course of your being connected with the Dependable Ladder Company, both as superintendent or shop foreman, did you say?

A. Yes.

Q. And as owner, how many ladders have you had there from the Yakima Valley, approximately, if you can state, for repair?

A. Well, that would be a very hard thing to say.

Q. Would it run into many figures, or just a few? A. It would be many figures.

Q. Would it be over a thousand? [508]

A. Yes.

Q. Now, in your repair work what do you do so far as the growers' directions are concerned. Do you do general repair or do you repair as ordered?

A. We repair both ways.

Q. During that course of business, both the shop

(Testimony of Herbert Rossow.)

foreman and as the owner now, have you had an opportunity to observe ladders brought into your place of business from all points of the Yakima Valley? A. Yes.

Q. And have you observed those portions of those ladders which were not brought in to be repaired? A. Yes, I have.

Q. In addition to that opportunity for observation, what other contact, if any, have you had with the orchard business in the Yakima Valley to become acquainted with ladders in common use throughout the Valley?

A. Well, we go out and pick up ladders out at the different ranches and, consequently, we get to see all different types of ladders that are being used on the different ranches.

Q. Can you say that you have gained a familiarity with ladders in common use throughout the Yakima Valley?

A. I can very truthfully say "yes."

Q. Have you had any other occupation in the last five or [509] six years, other than in the ladder business, such as you have testified?

A. No, that is the only occupation I have had.

Q. I see, have you become familiar with a particular ladder, one that belongs to Mr. Walter Swier of Cowiche, which was brought to your place to be kept? A. Yes.

Q. And directing your attention to a ladder in the courtroom, do you recognize that as the ladder in question? A. I do.

(Testimony of Herbert Rossow.)

Q. Perhaps you don't recall the exact time, but as best you can recollect, how long has that ladder been in your place of business?

A. It's right around a year, maybe a little more, I can't just exactly say when it was brought in.

Q. Have you yourself made any inspection or inspections of the ladder?

A. I have seen it, inspected it, certainly.

Q. And have you yourself climbed on the ladder and done any testing of it?

A. Yes, I have climbed on the ladder.

Q. And have you tested the ladder in any way?

A. Other than climbing on it and testing it for looseness, that is the only thing.

Q. I see, and have you at one or more times while it has [510] been there, examined the top part of this ladder? A. Yes.

Q. And what did your examination reveal concerning that portion of the ladder?

A. There is a little looseness up in there, but it doesn't make any difference on that.

(Whereupon, counsel Splawn brought the ladder forward in the courtroom.)

Q. Incidentally, do you remember when that ladder, or the occasion of it coming into your plant for storage?

A. No, I don't remember just when it came in because I, up until the first of the year, I was in and out of the shop considerable.

Q. I see. Do you remember becoming aware of the ladder in your shop? A. Yes.

(Testimony of Herbert Rossow.)

Q. And did you make observations of the ladder concerning its condition?

A. Yes, I checked it over when it was brought in, as soon as I knew it was brought in there.

Q. Incidentally, do you recall any occasion when a Mr. Hudson and a Miss Loveland and Mr. Mullins, attorneys, were out at your plant and made an inspection of this ladder; do you remember that occasion?

A. Yes, that was just about a year ago, or prior to a year. [511]

Q. Were you there? A. Yes.

Q. Did you attend that inspection?

A. I did.

Q. And will you step down, Mr. Rossow, and test this ladder for its play or looseness?

A. (Witness examines ladder) At that time it was inspected by me, I am quite sure I am right, it was in the center, the tongue was set in the center, and there was approximately four inches play in this center over on the one side, not so much on the other side; you can push over there about four inches play in the bottom of it.

Q. Well, what about the comparison of that play, such as you have demonstrated there as it is now, with what that play was, Mr. Rossow, on the occasion that you refer to, namely, about a year ago, when these people were present and inspected it, and you attended that inspection?

A. It was measured several times.

Q. Who measured it, as you remember?

(Testimony of Herbert Rossow.)

A. I think the gentlemen right here measured it (indicating).

Q. That is Mr. Hudson, and do you remember what he used to measure it with? A. A ruler.

Q. It was your ruler? Do you remember his measuring the arc or the width of play of the tongue at the bottom? [512] A. Yes.

Q. And what measurement do you remember that was made that you observed?

A. I observed it was four inches.

Q. And how was the ladder set for that to be done?

A. Just, it was setting on a table saw that represents this position right now.

Q. I see. Is there any change in the condition of that ladder—and make whatever inspection you wish to make of it now, Mr. Rossow—that appears to you to be different from that condition as it existed on the occasion to which you refer.

A. Well, I have seen the ladder practically every day for the last year, it has been moved around in the warehouse there, but I cannot see any change in it at all.

Q. Now, I direct your attention, Mr. Rossow, to the bolt at the top. A. Which?

Q. Do you discover any washers?

A. Yes, there is two washers on this side, and one on this side (indicating).

Q. What do you remember, Mr. Rossow, of your own independent recollection concerning the presence or absence of those washers?

(Testimony of Herbert Rossow.)

A. Those washers were on there when the ladder was brought [513] in.

Q. You know that? A. Yes.

Q. Now, the play of the tongue, as you have demonstrated, being more to the right as I am sitting at the bottom of the ladder, with the ladder turned over and the tongue on top, that was the condition, was it, at that time, more to that side than the other?

A. Yes, it was measured several times down here during the course of the examination down there, and I can recollect that it was four inches play, at least four inches.

Q. I see. Now, do you remember any other measurement that was made by anyone present on that occasion about a year ago?

A. No, I don't remember of any other measurement.

Mr. Splawn: I see. You may resume the stand.

(Whereupon, the witness resumed the stand.)

Mr. Hudson: Just leave it there.

Mr. Splawn: All right.

Q. Now, have you been present at your plant when Mr. Brazil and Mr. Hovde, of Selah, and Mr. Clark of the lower valley, have been there to examine and test the ladder? A. Yes.

Q. And did you observe what they did?

A. Yes, I observed what they did. [514]

* * * * *

Q. At the times that those gentlemen were at your place of business and examined the ladder,

(Testimony of Herbert Rossow.)

what did you observe [515] concerning the condition of that ladder and including the play of the tongue? A. Will you state it again?

Q. When the men to which I refer were out to your place of business and examined the ladder, you state that you saw them examine the ladder, I am not asking what they did; what about the condition of that ladder on the day those gentlemen were out as compared with it now, as you observed it?

A. Well, it's in the same condition as it was then.
* * * * *

Q. Directing your attention, Mr. Rossow, to the play in the tongue of this particular ladder, when that ladder is properly set does that play, or even any more play in that ladder, have any effect upon the safety of the ladder, if it is properly set.

Mr. Hudson: Before you answer that, Mr. Rossow, I am going to object to that because he hasn't been qualified to know how you set a ladder or whether it is safe or anything else. He has been qualified as a repairman and manufacturer.

The Court: Well, I will overrule the objection. It goes to the weight of his testimony and admissibility.

Q. (By Mr. Splawn): Do you understand the question?

A. If a ladder is properly set you will find that your steps are on a level position, the steps in between the siderails are on a level position if your ladder is set correctly. And if a ladder is set correctly it doesn't make any difference how much looseness is up in the top there, you can take the

(Testimony of Herbert Rossow.)

nuts clear off of that and bolts, if you want to, and it will still be just as safe as it is with the nuts on.

Mr. Splawn: That is all. [523]

Cross Examination

Q. (By Mr. Hudson): Mr. Rossow, when did you arrange with Mr. Splawn to give your testimony today?

A. I don't rightfully remember.

Q. Sir?

A. I don't remember just when it was.

Q. Did he arrange with you to give your testimony today? A. Pardon?

Q. Did he arrange with you to give your testimony today?

A. I was subpoenaed and I was called today, yes.

Q. And have you discussed this matter with Mr. Splawn since the recess of court at twelve o'clock today? A. No.

Q. You haven't discussed it with him at all?

A. I have talked to him, but I haven't discussed the ladder with him.

Q. You didn't even talk about the ladder?

A. No, sir, he just told me that I was supposed to appear here at one-thirty.

Q. And said nothing else? Now, were those instructions given you after twelve o'clock today to be here at one-thirty? A. Yes.

Q. Now, this ladder was delivered to you, you say, a year [524] or so ago?

(Testimony of Herbert Rossow.)

A. It was picked up and brought down to the warehouse there, yes.

Q. And it has been in your care even since?

A. Yes.

Q. Now, when was this ladder picked up from your place?

A. I believe it was Monday morning.

Q. Of this week? A. Yes.

Q. Do you know what time?

A. At eight o'clock.

Q. About eight o'clock? And you have no knowledge as to whether the ladder was brought directly here or not, have you?

A. No, I have no knowledge of it.

Q. Now, you have stated that you recall the circumstance of Mr. Mullins and Miss Loveland and myself coming to your place of business about a year ago or so ago? A. Yes.

Q. Now, isn't it also true that Mr. and Mrs. Wong were with us? A. Yes.

Q. And we arrived there before Mr. Splawn arrived, isn't that right?

A. If I remember rightly, you rode out with Mr. Splawn. [525]

Q. Well, that isn't my recollection but I don't believe it makes any difference. And you got the ladder out for us and we tipped it over over a saw-horse, isn't that correct?

A. Over a table saw-out there.

Q. A table-saw, whatever it may have been. And I borrowed a steel rule from you?

(Testimony of Herbert Rossow.)

A. That is right.

Q. Now, you recall very distinctly my measuring the play in the tongue? A. Yes.

Q. And you have arrived, or your memory is refreshed, or something, as to what you feel was the distance of the swing?

A. I remember, I am positive that the swing in that ladder, because you measured it several times, not just once but several times, and if my memory hasn't failed me completely, I think you said four inches play in it there.

Q. Now, do you remember me measuring, what do you call this, a hinge or a yoke?

A. That is the back leg hinge.

Q. The back leg hinge? A. Yes.

Q. Do you recall me measuring some distances on this hinge?

A. You measured something there but I just don't remember [526] what you measured there, but I do remember measuring on the bottom there.

Q. Well, you remember measuring on the top, too, don't you?

A. Yes, you measured there, but I couldn't figure what you was measuring there.

Q. And I was measuring a gap between the side of the hinge and the side of the plate on the leg of the ladder, wasn't I? A. Yes.

Q. And I was measuring the amount of play that there was in this bolt compared to the hole here, wasn't I (indicating)? A. Yes.

(Testimony of Herbert Rossow.)

Q. And do you recall me stating "I would give a lot if I could take that apart"?

A. No, I can't say as I recall you saying that.

Q. But you do recall me measuring these two items?

A. You measured something up there, I wasn't right up there with you when you measured it.

Q. Do you recall the distance that I gave of the play?

A. No, the only thing I remember is the four inches play at the bottom of the ladder.

Q. Now, was that four inches to the left as I stand looking at the ladder, or four inches to the right?

A. Four inches to the right, I believe. [527]

Q. Are you sure? A. Yes.

Q. That it was four inches to the right? What was it to the left?

A. I don't remember on that. There was a radius of about six inches, I believe, over-all there where it goes back and forth, so that would leave about two inches to the other side, but I can't truthfully say what it was.

Q. But you are totally certain it was four inches to the right? A. Yes.

Q. That is your memory of it?

A. Yes, I never wrote it down, or anything.

Q. You don't recall me saying, "There is three-sixteenths inches on each side"?

A. No, I do not.

Q. Or in the bolt latitude?

(Testimony of Herbert Rossow.)

A. You commented on the size of the bolt, I remember that.

Q. But you don't recall the specific distance?

A. No.

Q. I wish you would step down here just a moment, please, and I wish you would observe, maybe you had better stand over there so that the jury can see, also; I wish you would observe where the side of the hinge joins the side plate on the ladder on either side, with a standard rule, [528] there is no way that that gap could be measured, is there, it's too small?

A. No, it's too small.

Q. You would have to have some kind of a fine instrument? A. Yes.

Mr. Hudson: Thank you, that is all.

Redirect Examination

Q. (By Mr. Splawn): Now, with respect to the over-all play of this tongue, Mr. Rossow, would you say it's any different today from what it was on that occasion or any other occasion when you examined the ladder?

A. I can't see any difference in it, myself. Like I say, it has been picked up, I picked it up several times and moved it, in order to move something in or out of the warehouse down there, and I cannot see where it has changed in any way, shape or form than it was the day that it was brought in. [529]

* * * * *

LOUIS C. MORITZ

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is Louis Moritz? A. Yes, sir.

Q. Where do you live? A. Zillah.

Q. And in what business are you engaged?

A. Pardon?

Q. In what business are you engaged?

A. Farmer, fruit farmer.

Q. Fruit farmer? A. Yes, sir.

Q. How long have you been a fruit farmer in the Yakima Valley? A. Since 1927.

Q. And what varieties of fruit have you grown, Mr. Moritz? [530]

A. I could almost say all varieties. Do I have to name them individually?

Q. No. Now, what offices or directorships have you held in organizations connected with horticulture?

A. Well, I have been and am a member of the Washington State Fruit Commission.

Q. You are now a member?

A. Yes, and a member on the Board of the Bartlett Pear Association since its original inception; and for two years I was the State Fruit Committee Chairman of the Washington State Farm Bureau. Offhand, that is all I can think of.

Q. What experience, Mr. Moritz, have you had

(Testimony of Louis C. Moritz.)

with fruit-picking ladders in the Yakima Valley and how they worked and operate?

A. Well, I can't say unlimited, but I can almost say that because I have harvested fruit on three different ranches all in one year, starting with, well, I harvested the pears and apples on two different ranches several times; the apples three times; and have had cherries almost consistently since I have farmed, so I have had practically a lot of use with ladders, if that is what you are referring to.

Q. And has that been in the Yakima Valley?

A. Entirely in the Yakima Valley. [531]

Q. What is your familiarity, if any, with ladders generally used in the Valley?

A. Well, I haven't had tremendously big crews in harvesting, but I have had, possibly, up to ten pickers and I have never had a foreman. I have had a man that works for me and he just kind of substituted when I wasn't there as foreman, so I have been entirely in charge of the help that I have hired in harvesting.

Q. And what about other places other than your own?

A. Well, I have harvested other places for men that I harvested for, they would be doing something else and, for instance, with my foreman, I used to harvest his place along with my place. He was working at a warehouse and I would harvest his crop along with my own crops. I hired the help and I fired the help, I furnished the equipment.

(Testimony of Louis C. Moritz.)

Q. What do you personally know about the use of a ladder and how a ladder operates and works?

A. Well, I would assume that I could tell whether a ladder was able to be used or not able to be used. I wouldn't want to put a picker on a ladder that I thought there was something wrong with.

Mr. Hudson: If the Court please, that isn't quite responsive to the question.

The Court: No, I don't think it is entirely [532] responsive.

Q. (By Mr. Splawn): What I am getting at, Mr. Moritz, is this: what experience you have had, personally, in the use of ladders and how they work and how they operate and what you can do with them and what you can't do with them?

A. Well, I have used a lot of ladders in my time, so that the only thing I can tell you is that I have used a lot of them myself, not only for my help but for myself.

Q. Have you examined a ladder that belonged to Walter Swier, of Cowiche?

A. Yes, he called me up one time and wondered when I was coming to Yakima and I said I didn't know, that was somewhere around close to noon.

The Court: I think the answer is "Yes," you have examined it?

A. Oh, excuse me, yes.

Q. (By Mr. Splawn): Now, directing your attention to this ladder that is down here between you and me, do you recognize that as the ladder which you examined?

(Testimony of Louis C. Moritz.)

Mr. Hudson: Well, to save time, I will say that it was the ladder.

The Court: All right, let's assume that it was.

A. I never looked at it, I just come in here and never did pay any attention except step around it, I assume it's [533] so.

Q. (By Mr. Splawn): And when was it that you examined this ladder?

A. You say "when was it?"

Q. Where was it?

A. Up at the Independent Ladder Company on Fruitvale Boulevard, or just off of Fruitvale Boulevard.

Q. It has been said to be the Dependable Ladder Company.

A. That is it, the Dependable Ladder Company.

Q. And how much of an examination did you make of it, what did you do in your examination of this ladder?

A. I picked up the ladder and set it out just like I would if I had the ladder myself, tried it out, went up to the ninth step. I asked you what was wrong with it. You said, "I am asking you."

The Court: Just a moment, that is not admissible what you said or what he said to you, just what you did, please.

A. Excuse me. I looked the ladder over. I went up it and went back down.

Q. (By Mr. Splawn): Did you find anything about the ladder that would make it unsafe to properly set and use?

(Testimony of Louis C. Moritz.)

A. Safety? I didn't think so.

Q. Did you observe any play in it?

Mr. Hudson: Now, just a minute, let's let him [534] testify.

Q. (By Mr. Splawn): All right, what, if anything, do you observe concerning any play in the tongue of the ladder?

Mr. Hudson: Now, just a minute, let's let him testify, not ask where the play was. If you want to testify, be sworn.

Mr. Splawn: It's already there, I mean, we are not quibbling.

The Court: You can ask him what, if anything, unusual he found about the ladder, I think, would be a fair way to put it.

Q. (By Mr. Splawn): Did you find anything unusual about this ladder different from other ladders?

A. When I looked at the ladder, the first thing I looked at was how loose the steps were. I found they were not, they were tight all along. I started to throw the ladder out and I noticed the pole had a little sway back and forth; to me, that was not unusual because I have had a ladder tight at the top and my picker has loosened it so he could move the pole around a limb when he would use it, so I tried it. It was on solid ground where I could set the pole straight ahead. I threw the pole out, it went straight ahead. I crawled up the ladder and crawled back down. I told you, as far as I could see, the ladder was safe. [535]

(Testimony of Louis C. Moritz.)

The Court: That last remark will be stricken and the jury instructed to disregard it. We have rules against hearsay, Mr. Moritz, about something that was said out of the parties' presence, a rule of evidence.

Mr. Splawn: I was talking to the witness, I am sorry.

The Court: I beg your pardon.

Mr. Splawn: I am sorry to interrupt, I thought you had finished, your Honor.

Q. What opinion did you arrive at, not what you told me, but what opinion did you arrive at after testing the ladder in that fashion?

A. I assumed the ladder would be safe enough for me to put a picker on.

Q. Now, with respect to the top of the ladder, incidentally, would you step down, Mr. Moritz? You haven't seen this ladder since you were out here?

A. No, sir.

Q. That has been how long ago?

A. I would say, approximately three weeks ago.

Q. I see, will you look at the ladder and test the tongue in any way you see fit to demonstrate any play?

A. (Witness examines ladder.)

The Court: It isn't questioned that there is any play in the tongue or steps, Mr. Moritz, you needn't waste any time on that. [536]

Q. (By Mr. Splawn): There isn't any claim of that. Now, when you were out there did you observe the play which you just indicated in the tongue?

(Testimony of Louis C. Moritz.)

A. Yes.

Q. As you recall, is there anything about that ladder that is different now than it was then?

A. (Witness examines ladder.) I don't think so. No, I don't believe so.

Q. All right, you may resume the stand. Assuming this ladder were set properly and the tongue centered and placed in the center of the ladder and on disked ground, practically level, and a person, let's assume weighing around 150 pounds with a bag about half full of apples, standing on the eighth rung with both feet on the rung and that person turning the body slightly to the right in order to ease the pressure of the bag of apples on the frame of the ladder, and that was all, not reaching to one side or to the other, can you see any conceivable way how that ladder could tip under those circumstances? A. I certainly do not.

Q. Well, in order to make this ladder tip or collapse or move in some way when it is set properly, what would have to happen to cause that?

A. Well, I would say it's possible for the weight of your apples to shift you off balance. It would not be hard [537] to do that if a person is not careful, you could, the weight of the apples in your sack if you are not against the ladder, it would be possible if the weight shifted that you could go sideways.

Q. Would that be because of the ladder, itself?

A. I wouldn't think so, I would say "no."

Q. What about reaching to one side or the other, I mean, the picker's own movements on the ladder,

(Testimony of Louis C. Moritz.)

what effect can that have upon the ladder's tipping or this ladder's tipping or collapsing in some way?

Mr. Hudson: Now, if the Court please, I don't believe that item is in question about what the picker does when he gets out over here (indicating). There is no testimony before the jury relative to that. I believe the question is totally irrelevant.

The Court: I will overrule the objection.

(Last question read.)

A. Well, I would say this ladder should not collapse unless you overbalanced. Unless you shifted your own weight too far sideways, and I believe that could happen with any ladder, no matter what ladder it would be.

Q. (By Mr. Splawn): Even a brand new one?

A. That is right, no matter what ladder it would be I think it would still do the same thing.

Q. Can you set up a ladder and not get on it, set it up [538] properly and center the tongue and push on one side and make it cramp?

A. I certainly can.

Q. Well, can you do that with a brand new ladder that has never been in use and it is tight at the top?

A. I can after I have used it a while because it is going to get in shape that it can.

Q. I see, well, with weight on the ladder, that is, the type of weight that I indicated and up toward the top as far as I indicated, is there anything that can cause the ladder to tip or collapse or fall over because of any play or looseness at the top?

(Testimony of Louis C. Moritz.)

A. I would say not unless your weight shifted and caused it to overbalance and I would say that would be my fault if the weight over-shifted or shifted to cause the ladder to fall.

Q. Would it be more apt, would this ladder be more apt to do that than a brand new ladder, that is, if you broke it in yourself?

A. I would say, yes, I would have to say yes.

Q. Now, so far as ordinary picking activities are concerned upon a ladder, that is, picking fruit from a ladder, is there anything about this ladder that would make it unsafe so far as the ordinary picking is concerned, reaching for the apples and putting them in your bag and [539] coming down, was there anything unusual about this ladder?

A. I would say no.

Q. Would you have any fear to use this ladder yourself?

Mr. Hudson: I object.

The Court: I will sustain the objection to that, that isn't a question.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): Mr. Moritz, I noticed when you inspected the ladder you picked the tongue up and moved it and you were quite observant about the hinge up at the top, you were hesitant about your answer; did you think there was anything unusual about that hinge?

A. About this ladder?

(Testimony of Louis C. Moritz.)

Q. This hinge here (indicating) ?

A. This ladder is loose right at the top, I know that.

Q. Yes, now, I will give you a hypothetical case, please, Mr. Moritz: three-sixteenths of an inch is pretty near the width of that pencil, isn't it ?

A. Approximately.

Q. Now, may we assume there is a three-sixteenths inch play on each side of the hinge this way (indicating) ? [540] A. Yes.

Q. And there is, approximately, the same amount in this bolt, that is, in the hole compared to the bolt ? A. Yes.

Q. Assuming those facts in your opinion would that make a difference in the stability of the ladder so it would twist more ?

A. I would say, well, I would answer that, yes.

(Last question and answer read.)

Mr. Hudson: I am through.

Redirect Examination

Q. (By Mr. Splawn): Had you finished, counsel ?

Mr. Hudson: Yes.

Q. (By Mr. Splawn): Now, that would increase the play, would it, Mr. Moritz ?

The Court: Just a moment, that is a leading question, if you want to ask him in what respect it would make a difference, all right.

Q. (By Mr. Splawn): Yes, in what respect

(Testimony of Louis C. Moritz.)

would it make a difference so far as the safe use of the ladder is concerned?

A. I wish I could demonstrate by using the ladder.

Q. Would it make any difference? [541]

A. If the ladder was as tight as the gentleman stated my picker wouldn't have that ladder very long.

Q. Well, did you understand counsel's question?

A. I certainly did, but a ladder in use for my picker cannot be so tight, throwing it forward, that the pole will not shift a slight amount back and forth so he can put it through limbs or around limbs, that is the idea that a picker likes to use, is that they can move the pole and not have it go, they will set the ladder up, for instance, and take the pole and move it one way or the other to get it around the limb. If it is like a new ladder, for instance, personally, my pickers do not like new ladders until they get loosened up because they are too tight where the pole fits in the top of the ladder until they have been used a little bit to make that pole move a little when it is shoved ahead.

Q. Well, if you provide more looseness than there is now, would that make any difference?

A. That is the way a picker would want it, so they could move it one way or the other. You have the pole over there.

The Court: I think that has been explained. Let's have question and answer procedure here, please.

(Testimony of Louis C. Moritz.)

A. I am trying to.

The Court: Answer his questions and he will ask you [542] the questions. You have gone far beyond his questions in many cases here. Go ahead.

Q. (By Mr. Splawn): Even if this were looser than it actually is now, would that make this ladder unsafe?

A. No, definitely not, it would not make that ladder unsafe. [543]

* * * * *

WALTER SWIER

the defendant, recalled as a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): Walter, when you were out with Mr. Kent Wong to see the ladder after the accident, you referred to that occasion I believe, yesterday, did you yourself do any specific measurement? A. Yes, sir.

Q. Will you describe what you did?

A. Oh, I had the usual pocket rule, steel rule, with me. We went to the ladder there, it was laying, oh, I would say on its back; in other words, it was laying flat with the third leg on top of the steps. We centered it and then I would move it to the right and to the left.

Q. Was he there? A. He was there.

Q. And how did you measure that, what measurement did you make? [548]

A. Well, from the central point I moved it over

(Testimony of Walter Swier.)

four inches to the right, that is, facing it, with the leg up and approximately three to the left.

Q. I see. Well, during the course of the trial have you had any occasion to test the ladder and the play in the tongue? A. Yes, sir.

Q. Well, Walter, you found what was the comparison?

A. Oh, it's almost identical. I haven't measured, but just, you know—well, I know how much four inches is, or an inch is.

Q. I see.

A. I can see no appreciable difference whatsoever.

Q. One other question. Well, so far as any other feature of the ladder is concerned, and you have observed it during the trial, have you not?

A. Yes, sir.

Q. Well, have you found anything different about the ladder in any respect from what it was while it was still on the place and before it went to Dependable ladder?

A. I would say it's identical.

Q. When you gave the ladder to the Wongs at the beginning of the apple picking, I believe you testified that you gave them their ladders?

A. I did. [549]

Q. Do you remember mentioning anything to them concerning the use of the ladder, and if so, what was it?

A. Well, I always mentioned to all pickers when they start out, if there was anything wrong or they

(Testimony of Walter Swier.)

break a bag, or anything wrong with a ladder, sometimes a step breaks, to use another one and I would replace it.

Q. Was any report made to you concerning this ladder or any other ladders?

A. No, sir, nothing spoken of a ladder.

(Last question and answer read.)

Mr. Hudson: Thank you.

Q. (By Mr. Splawn): If there had been a report on this or any other ladder, from the one using it, that there was something wrong with it, what would have been your reaction to that?

Mr. Hudson: To which, of course, we object.

The Court: I will sustain the objection.

Q. (By Mr. Splawn): May I ask you, would it have been repaired?

The Court: I will sustain the objection to that line of testimony.

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): Yes, sir, I believe you testified that you have been in [550] the apple business since about 1927, is that correct?

A. Oh, prior to that.

Q. Prior to that? A. Yes, sir.

Q. Now, what organizations have you been connected with which are affiliated with the fruit growing industry?

A. Oh, the Washington Cannery, Cowiche Grow-

(Testimony of Walter Swier.)

ers, State Horticultural Association, Washington State Horticultural Association.

Q. Any others?

A. At the moment it doesn't come to mind.

Q. Have you held in those organizations any positions? A. Yes.

Q. What were those positions?

A. Well I have been a Trustee of the Cowiche Growers for a period of years.

Q. Any others?

A. Yes, sir, I am currently also a Trustee in the Washington Co-operative Cannery.

Q. Any others?

A. Well, I am a member of the State Horticultural Association; that don't have any bearing on this.

Q. Well, whether it has a bearing or not, why, tell me of any other organization that you are connected with?

A. In connection with fruit production? [551]

Q. Anything connected with fruit, whether it is fruit production, fruit growing, fruit pruning, spraying, any organization.

A. Only indirectly as it affects the other organizations.

Q. Well, what are those?

A. Well, there would be, for instance, the Yakima Valley Spray Plant, and as a member of the Cowiche Growers. I am also affiliated indirectly with a Co-operative in Wenatchee. They don't know it, perhaps.

(Testimony of Walter Swier.)

Q. Any others?

A. At the moment I can't think of any.

Q. Now, those organizations that you have named have been also named by, or some of them have been named by Mr. Clark, as an organization that he was connected with, is that not true?

A. That is true.

Q. And Mr. Brazil?

A. No, I have no connections with Mr. Brazil.

Q. I am asking if you have a connection with him?

A. With the organizations to which he belongs, sir, that is what I mean.

Q. And with Mr. Hovde?

A. None whatsoever.

Q. Now, do you know Mr. Clark?

A. Yes, I do. [552]

Q. You have known him for some time?

A. Oh, a year and a half, perhaps.

Q. That is all?

A. Yes, that is true, I only first met him, personally.

Q. You have known of him for some time previously?

A. I have known of him because he was a State Legislator and his name is very prominent in the news.

Q. And do you know Mr. Brazil?

A. No, sir, I never met him or never saw him, to see who he was, until yesterday.

Q. Do you know Mr. Hovde?

(Testimony of Walter Swier.)

A. No, sir, I never met him until yesterday.

Q. Does Mr. Hovde belong to some of the organizations that you testified to?

A. No, sir, none of them. He is prominent in the Farm Bureau.

Q. Sir?

A. I say, he has been prominent in the Farm Bureau.

Q. Have you got anything to do with that?

A. No, I am not a member.

Q. But all of these men are orchard growers or orchard men here in the Valley? A. Yes, sir.

Q. And, generally speaking, all orchard men in the Valley are acquainted or know of other orchard men in the [553] Valley, do they not?

A. Oh, the more prominent ones, perhaps.

Q. Now, do you know Mr. Moritz?

A. What do you mean?

Q. Who testified here yesterday?

A. Moritz? I have no recollection.

Q. Would that be a correct name?

Mr. Splawn: Moritz, it's with a "Z," counsel (spells) M-o-r-i-t-z, wasn't it?

A. No, sir, I do not know him.

Q. (By Mr. Hudson): Do you know Mr. Ros-sow of the Dependable Ladder?

A. No, sir, I do not. I never met him until yesterday out in the corridor. I didn't meet him then, I beg your pardon.

Q. You use Dependable ladders?

(Testimony of Walter Swier.)

A. I do. This is a Dependable ladder (indicating). [554]

* * * * *

DAVID SWIER

called and sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

Q. (By Mr. Splawn): Your name is David Swier? A. Yes.

Q. And you are related to the defendants Walter and Laura Swier, are you? A. Yes, sir.

Q. And you are a son? A. Yes, sir.

Q. An adopted son? A. Yes, sir.

Q. And you live where, David?

A. On the Swier ranch.

Q. And how old are you?

A. Thirty-six.

Q. Married? A. Yes, sir.

Q. In October of 1955 state where you were living? A. On the Swier ranch.

Q. And where were you then employed?

A. By my father.

Q. Do you remember the occasion of an accident on your [555] father's place in October, 1955?

A. I do.

Q. And was that the accident of Rose Wong?

A. Yes.

Q. Was she then living on the place?

A. Yes.

Q. Do you, yourself, of your own independent

(Testimony of David Swier.)

recollection, remember the date of the accident?

A. Yes, I do.

Q. And what was the date?

A. Well, I was picking apples three or four rows over from her.

Q. I will ask you if you remember the date of the accident?

A. Oh, the date was in October, I think it was about the 17th.

Q. I see. Did the accident happen in the morning or the afternoon, that you recall? Well, perhaps you don't recall the time?

A. It was in the morning.

Q. What? A. In the morning.

Q. In the morning? And where were you when the accident happened?

A. Picking in the same orchard.

Q. I see, and about how far removed from the place where [556] the accident occurred?

A. About three rows over.

Q. And do you remember in which direction, David, you were?

A. Well, I was southeast from there.

Q. I see, southeast of the tree where the accident happened, you mean? A. Yes.

Q. What was it that first brought to your attention that an accident had occurred?

A. Her daughter started running across through the orchard hollering, and I heard her and asked her what was wrong and she told me, so I immedi-

(Testimony of David Swier.)

ately dropped everything and went over to see what was wrong.

Q. Did the daughter say an accident, what was it?

A. She said her mother broke her leg.

Q. What did you do then?

A. I immediately dropped everything and went over to see what happened, and she was lying on the ground.

Q. I see. When you arrived there who was there? A. Her husband.

Q. Do you remember anybody else being there?

A. No.

Q. Did other people come up later?

A. Yes, they did.

(Last question read.) [557]

Mr. Splawn: It was leading, your Honor.

The Court: Well, that is all right.

Q. (By Mr. Splawn): What did you observe about the ladder when you arrived there?

A. The ladder was tipped, it was over, the tongue was over a pile of apples, boxes full of apples.

Q. How big was this pile of apples that the tongue was over?

A. About six to nine boxes.

Q. And how high were they stacked?

A. They were three high.

Q. And the legs of the ladder, where were they with reference to this pile of boxes?

(Testimony of David Swier.)

A. They were on one side of the boxes, the tongue on the other.

Q. Was the ladder on the ground?

A. No, leaning against the limb.

Q. Against a limb? A. That is right.

Q. Now, when you arrived there did Mrs. Wong say anything concerning what had happened to her and, if so, what did she say?

A. I don't know the exact words, something about, something on the order of reaching too far and falling and striking her leg on the box. [558]

Q. I see. Did you ever have, yourself personally, any later conversations with Mrs. Wong concerning the accident? A. No.

Q. As you recall, what became of that ladder?

A. It was picked up later.

Q. Well, did it remain in the orchard after that time or was it taken some place first?

A. I believe it was taken in.

Q. Did you, after the accident any time and before the ladder left the place, examine the ladder?

A. Yes.

Q. That was while the ladder was still on the ranch? A. Yes.

Q. Now, have you ever had an opportunity to examine the ladder since that time? A. No.

Q. You have been in attendance as a witness now in court, have you, for several days?

A. Yes, sir.

Q. Have you been in the courtroom?

A. No, out in the corridor.

(Testimony of David Swier.)

Q. Who prepared the ladders on the Swier ranch for the harvest period? A. I did. [559]

(Whereupon, the ladder was brought forward to the jury box.)

Q. David, I am showing you the ladder in question, there is no argument about that, and I would like to have you step down and examine this ladder in whatever way you see fit, and I particularly direct your attention to any looseness or play in the tongue, and I would like to have you look at the assembly at the top, and bolts or nuts that are affixed to the top. Did you examine the other side, too? A. Yes, I did.

Q. Now, I am going to ask you this question, David: is there anything about this ladder—

The Court: (Interposing) Pardon me, respecting the ladder I think it would be easier if he would get back here (indicating). The jury can hear him better. He has inspected the ladder.

Q. (By Mr. Splawn): Is there anything about this ladder different than the way it was when it was on the place and before it left the ranch?

A. No different.

Q. Now, I don't know whether you took any notice or not but at the top of the ladder where those bolts go through, did you observe anything besides a nut? A. Yes, sir, a washer. [560]

Q. What? A. A washer.

Q. What do you know about washers?

A. They were put on there at the time to keep them from turning.

(Testimony of David Swier.)

Q. Who put them on, David? A. I did.

Mr. Splawn: Your witness.

Cross Examination

Q. (By Mr. Hudson): Did you discuss this ladder with anyone since yesterday?

A. Only with Mr. Splawn. The fact that—

The Court: (Interposing) Well, you have answered the question.

A. All right.

Q. (By Mr. Hudson): Did you, personally, Mr. Swier, ever make any measurements on that ladder? A. No, sir.

Mr. Hudson: I think that is all.

Redirect Examination

Q. (By Mr. Splawn): Well, counsel has asked you if you discussed the ladder with me. When was it? [561] A. This morning.

Q. And what did I ask you?

A. On the condition of the ladder at the time that I saw it.

Q. And what else did I ask you?

A. Whether the ladder was safe.

Mr. Hudson: Pardon me?

(Last answer read.)

Q. (By Mr. Splawn): Did I not further ask you if you got in the courtroom you were to test that ladder and make a comparison?

The Court: I think that is leading and I don't

(Testimony of David Swier.)

believe that counsel's interrogation permits you to go into the whole conversation.

Q. (By Mr. Splawn): Was there anything in our discussion this morning in any way that I indicated to you what your testimony was to be?

A. No, sir.

Mr. Splawn: That is all.

Recross Examination

Q. (By Mr. Hudson): Did you discuss the ladder with your parents last evening?

A. No. [562]

Q. Yesterday afternoon? A. No.

Q. This morning? A. No.

Q. Did you see them yesterday?

A. Yes, sir.

Q. Did you see them this morning?

A. Yes, sir.

* * * * *

LAURA SWIER

the defendant, called and sworn as a witness in her own behalf, testified as follows:

Direct Examination

Q. (By Mr. Splawn): You are Laura Swier?

A. I am.

Q. And one of the defendants left in the case?

A. Yes, sir.

Q. Your husband is Walter Swier?

A. Yes, sir.

(Testimony of Laura Swier.)

Q. And you live with him, do you, in Cowiche?

A. Yes, I do. [563]

Q. And, of course, you know Mrs. Wong?

A. Yes, I do.

Q. And that has been through, briefly, what contact and connection?

A. Well, she has been a missionary friend for many years, and a personal friend in the last, almost thirteen years.

Q. Did the Wongs ever live on your place?

A. Yes, sir. .

Q. And they came to your place to live about what time of year?

A. Well, the children, Richard came to live on our place for a couple of months in 1954, in late May, and stayed a couple of months. We took him back home when we were going on a trip in Idaho, and then in the fall of that same year the three older children, Richard, Rosemary and Marjory came to live with us while their parents expected to go to China, and when they didn't go, Mr. and Mrs. Wong came in I think it was late June or the first of July, to stay with us until further plans were made for their future.

Q. And they continued to live on your place, then, until about what time, what year?

A. They stayed with us until, I think it was along late April or the first of May, in 1956.

Q. Do you remember the occasion of an accident? [564]

A. Yes, I do.

Q. And what month was that, or the date, if

(Testimony of Laura Swier.)

you know; you probably know the date, don't you?

A. It was on Monday, October 17th, nearly eleven o'clock.

Q. And where were you when you first learned about the accident?

A. I was in the kitchen and Marjory came running and screaming, "Mother broke her leg, Mother broke her leg, call the doctor."

Q. And Marjory, I suppose, is one of the Wong children?

A. Yes, Marjory is the second daughter.

Q. Did you thereafter visit with Mrs. Wong and see her?

A. Yes, I saw her every day in the hospital for the first month, and then quite often after that.

Q. I see. As you recall, Laura, when did Mrs. Wong return from the hospital to your place?

A. I think it was December 13th, I know it was a couple of weeks before Christmas.

Q. I see. Were they there Christmas?

A. Yes, they were in our home Christmas day.

Q. You had dinner for them? A. Yes.

Q. After, did you ever have any conversations or conversation with Mrs. Wong, or inquire what happened? A. Yes, very often. [565]

Q. And that would be over what course of time or what period of time, would you say?

A. Oh, after she began to improve in the hospital, we talked about it, and then also after she returned home we were over there every day.

(Testimony of Laura Swier.)

Q. Well, did you ask her how the accident happened?

A. Yes, I did ask her if she could recall how it happened. I know it is hard to remember in the confusion what does happen.

Q. What did she tell you had happened? How did she describe what happened?

A. She told me she had been reaching for some apples, she started to step down when she felt the ladder give. She immediately knew she had to get off of it, and when she started to climb down, she fell.

Q. And what did she mention about the apples?

A. Well, that there wasn't many left on the tree and that she wanted to finish the tree, is all I can remember.

Q. Did she ever indicate where she was on the ladder when she fell?

Mr. Hudson: Now, if the Court please, just let this lady tell what conversation took place.

The Court: I think the proper way is to ask her what the conversation was and what all of the conversation was. [566]

Q. (By Mr. Splawn): Give all the conversation, Laura.

A. Well, I just can't, I couldn't recall all the conversations all the time. We talked about it several times, but I know one morning we were talking about it and I spoke to her and I said, "We did find some looseness in that ladder, Rose."

(Testimony of Laura Swier.)

Q. You told her that there was some looseness in the ladder? A. Yes, I did.

Q. Yes, and incidentally, Mrs. Wong testified to an occasion between three and four weeks after her entry into the hospital and in the hospital room where you were, and you had made a statement to her concerning the ladder. I ask you what you just said, was that the occasion?

A. Yes, that was one of them. There was one more, about nine o'clock, she had her youngest daughter, Wendy, with her, and we went to visit her at the hospital.

Q. I see. Well, she testified that you said that there was something wrong with the ladder.

A. Well, I told her there was some looseness in the ladder.

Q. I see. Well, that was after, so far as you knew there was looseness in the ladder?

A. Yes.

Q. What else can you recall in your conversations with Mrs. [567] Wong about the accident and where she was on the ladder, or anything further that you remember that she said about this affair?

A. Well, we often remarked how she could get hurt so desperately and not fall any further than she fell. I don't know what else.

Q. Did she ever say how far she had fallen?

A. Well, I don't know as she said exactly how far, but, that I can recall, but we used to think she must not have fallen over four or five feet, how could she have gotten hurt so much.

(Testimony of Laura Swier.)

Q. Did she ever tell you what she fell on?

Mr. Hudson: Now, if the Court please.

The Court: I think it isn't necessary for you to suggest things to the witness.

Mr. Splawn: I am not trying to suggest, your Honor. These are various conversations over a period of time and I know the witness probably can't remember each one. I am merely asking her what she recollects about what was said on various occasions, apparently stretched over a period of time.

The Court: All right, you may answer that.

(Last question read.)

A. Yes, she fell on the ground, she thought she had wacked her ankle against the box. [568]

Mr. Splawn: That is all.

Cross Examination

Q. (By Mr. Hudson): When did you first meet Miss Loveland here, the lady here at the counsel table? A. Personally, or by telephone?

Q. Personally?

A. I don't recall the date, it was sometime in the summer or spring. Let's see, when was it? I think it must have been in the spring of '56, I am not sure, but it was in the spring.

Q. You met her here in Yakima or, rather, this vicinity?

A. Yes, I met her out at Cowiche at our place.

Q. She came out there? A. Yes.

(Testimony of Laura Swier.)

Q. At the time you knew she was a lawyer, at least you were advised of it? A. Yes.

Q. And you generally discussed this situation, did you not?

A. We discussed it a little. [569]

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THOMAS K. HUDSON

recalled as a witness in rebuttal on behalf of the plaintiff, resumed the stand and testified further as follows:

Direct Examination

Q. (By Miss Loveland): Will you state your name, please? A. Thomas K. Hudson.

Q. And where do you reside, Mr. Hudson?

A. Denver, Colorado.

Q. And what is your profession?

A. I am an attorney with offices in Denver, Colorado, licensed to practice law in all the courts in Colorado and in all the Federal courts.

Q. Under your profession as an attorney and the practice of law do you have any other interest or business interest? [585] A. I do.

Q. And will you please tell me what they are?

A. Well, one of them is I have been connected with the manufacturing business for some period of years. I am also connected with the oil and gas business and I have been connected with the mining business. I have had a rather varied interest.

Q. I will ask you, Mr. Hudson, if the ladder which is in the courtroom now and which has, I believe, been designated as Plaintiffs' Exhibit 1, if

(Testimony of Thomas K. Hudson.)

you have ever prior to the commencement of this trial seen that ladder? A. I have.

Q. Can you tell me when?

A. The first time I saw this ladder was March 15, I believe, 1957.

Q. 1957? A. I believe that is correct.

Q. And where was the ladder at that time?

A. The ladder was at the Dependable Ladder Company here in Yakima.

Q. And was anyone else present at the time you viewed the ladder at Dependable Ladder?

A. There was.

Q. Who was there?

A. There was Homer Splawn, Mr. Rossow, if that is his name, [586] the gentleman who testified here yesterday, George Mullins, Alice Loveland, Kent Wong, Rose Wong, and there were two or three employees, or at least men around the Dependable Ladder Company that were there. I did not meet them and do not know their names.

Q. At that time and place, Mr. Hudson, did you make any inspection of this ladder? A. I did.

Q. Will you please tell me what you did?

A. Well, Mr. Rossow got the ladder and we put it down in a good deal the same position it is now, on a saw-horse, at which time I made an inspection of the ladder and made some measurements of the ladder.

Q. What measurements did you make?

A. (Witness approaches the ladder.) I believe at the time that I measured the tongue that we

(Testimony of Thomas K. Hudson.)

laid the ladder flat on the ground, with the tongue being uppermost. At that time the tongue would swing to my left as I faced the ladder, without resistance, between four and five inches. The reason I say between four and five inches is that down here (indicating) the tongue has been rounded off to a certain amount and it is difficult to just say exactly if it was four and a half or four and three-quarters. It would swing to the right, without resistance, between nine and ten inches, and by "without [587] resistance" I mean that there was no force necessary to swing it back and forth. It had a play of, oh, fourteen or fifteen inches total. I was particularly interested in what I have referred to as the yoke assembly, but have been advised that it is called the hinge assembly.

Now, to make that measurement down there I borrowed a steel tape from Mr. Rossow. I believe he testified yesterday he showed the tape that I had used. I also used that tape to make the measurements on the hinge.

Now, at that time there was a gap between the side piece of the hinge and the side piece attached to the ladder leg on each side, of three-sixteenths of an inch. There was also the same amount of play up and down on the bolt. There was three-sixteenths of an inch play there. At that time, referring now to the same side as I referred when I was standing facing the ladder on the left-hand side of this assembly, there are now two rather unusual washers. Those were not there at that

(Testimony of Thomas K. Hudson.)

time. At the present time these are pulled very closely together and there is no play sidewise, and if there is a play up and down it would have been restricted by the closeness of where it has been drawn up.

(Whereupon, the witness resumed the witness stand.)

Q. I believe you stated, Mr. Hudson, that you used a steel [588] measuring tape which you borrowed from Mr. Rossow to measure that play at the top of the ladder? A. That is correct.

Q. Can you take a steel tape and measure that play as the ladder is now?

A. There is no play there now, you couldn't get a knife blade in now.

Miss Loveland: You may examine.

Cross Examination

Q. (By Mr. Splawn): You are one of the attorneys of record, are you not, Mr. Hudson?

A. Yes, sir.

Q. And do you remember going out to Dependable Ladder Company on that occasion in my car?

A. I had rather thought yesterday that I had gone out in another car, but I now know that I did go out in your car, and I think it was raining, you picked me up at the Chinook Hotel.

Q. And that has come to you since yesterday?

A. Yes, sir.

Q. You hadn't recollected that?

A. I had thought that, I had been under the

(Testimony of Thomas K. Hudson.)

impression that we had gone out and that you were a few minutes [589] late, but that is not correct. I rode out with you and I believe Mr. Mullins rode back with you.

Q. That is correct. Now, when you were doing these measurements is it not a fact that Mr. Rossow was there with you observing what you were doing?

A. Not only Mr. Rossow was there, but you were there and you were just as interested as I was, apparently.

Q. That is correct.

A. (Continuing) And——

The Court: (Interposing) You should permit the witness to complete his answer. Had you finished your answer?

A. No, sir. The Wongs were there, and Miss Loveland was there.

Q. Yes.

A. Mr. Mullins was there, we were all interested in the condition of the ladder.

Q. (By Mr. Splawn): And is it not a fact that Mr. Rossow, when he loaned you his tape to measure with, that he was the closest one to you and watched and discussed with you, and you discussed with him, this ladder and what you were doing?

A. No, I don't think he was the closest one. Everybody was grouped around it. If there was a discussion it was with everyone. [590]

Q. And do you remember talking to Mr. Rossow on that occasion about the safety feature of the ladder?

(Testimony of Thomas K. Hudson.)

A. In the event I did, I don't recall it.

Q. You don't recall it?

A. I know that I made the remark to him, "I would sure like to take this ladder apart."

Q. Do you remember his mentioning to you after you had made an inquiry of him as to the safety of the ladder an answer that was very disappointing to you and you expressed surprise?

A. That could have been, Mr. Splawn. I am not going to tell you that it did not occur. I was deeply interested in the condition of the ladder.

Q. What is your financial interest in this case, Mr. Hudson?

A. Well, I will be happy to tell you my financial interest in this case: Miss Loveland and I and a Clarence Button have been associated in the law business for in excess of twenty years. When this situation arose Miss Loveland made a trip out here and, as has been testified to, talked with the Swiers. Now, I will tell you about this financial interest, I wanted to give you the background.

Q. Well, now, what is your financial interest at the present time in this case?

A. My financial interest in this is that regardless of [591] what the recovery is, if there is a recovery in this case, that I do not receive one dime.

Q. For your time? A. For my time.

Q. And your expenses out here?

A. My expenses out here. This, my participation in this hearing out here, is a courtesy to one Alice Loveland and I am sure that she would return the

(Testimony of Thomas K. Hudson.)

same courtesy to me and has on previous occasions.

Q. You don't expect to be reimbursed for your out-of-pocket expenses?

A. My hotel bill and plane fare and one odd thing and another, those are being paid for, but my services as a lawyer and what I term my out-of-pocket expenses, I will buy some dinners, some lunches, cigarettes, and what have you, I don't even keep track of it, but I assure you if there is a recovery here, regardless of its size, amount, or anything else, I will not receive nor will I accept one penny, and that is my arrangement.

Q. And even though you are associated with Miss Loveland in the law practice?

A. Even though I am associated with Miss Loveland in the law practice; and, incidentally, she will receive nothing.

Q. Now, when next did you examine this ladder?

A. The next time I saw the ladder, I can't give you the date, but it was, oh, some months ago.

Q. When is the last time you examined this ladder? A. Friday of last week.

Q. What about what you testified to concerning?

A. The condition was the same then as I testified to.

Q. Then it's your position that since last Friday this ladder has been changed in those respects?

A. My position is that this ladder has been changed in the last week.

Q. Since last Friday?

(Testimony of Thomas K. Hudson.)

A. That is right, as I recall, I saw the ladder shortly following lunch last Friday.

Q. Yes. Now, you were in my office later?

A. Along four or four-thirty in the afternoon.

Q. Yes, that was after, presumably, you had inspected the ladder?

A. There is no "presumably," I had inspected it.

Q. Well, at the time of your inspection it was after you were out there to inspect the ladder?

A. Yes, your associate met us out there.

Q. Yes, this last Monday when your witness, Mr. Chauncey McDonald, from the Department of Labor, went over the ladder with you, what was the situation then?

A. I wouldn't have any idea. [593]

Q. You went over that ladder with Mr. McDonald this last Monday when you talked with the witness, didn't you?

A. I did not go over the ladder with Mr. McDonald.

Q. Weren't you here when Mr. McDonald examined the ladder? A. I was.

Q. And worked the play or looseness in the tongue? A. I did not.

Q. Weren't you examining Mr. McDonald?

A. I examined Mr. McDonald, I did not examine the ladder.

Q. This last Monday, I take it, there was no change in that ladder, as you have suggested it, of which you were aware?

(Testimony of Thomas K. Hudson.)

A. I wouldn't know anything about that, I didn't inspect the ladder Monday.

Q. You saw your witness inspecting it, did you not? A. Our witness was here.

Q. Yes, and your witness had inspected this ladder before last Monday, hadn't he?

A. If he said he had, he had. I don't know it, personally.

Q. When you said that you folks had had him out to look at the ladder on one other occasion, he had been out there on his own and examined the ladder?

A. He had been out there some time ago.

Q. Yes.

A. But as to any recent examination he may have made, I [594] wouldn't have any idea.

Q. Can you enlighten us at all of any idea that you have in mind as to who or how these claimed changes were made?

A. I wouldn't have the slightest idea who. I wouldn't have the slightest idea how. I can tell you how it could be done.

Q. You don't have any idea?

A. Not the slightest and, incidentally, I would like the ladder to show that that ladder has been in the possession of the Swiers or the Dependable Ladder, and these plaintiffs have never had it in their possession, isn't that correct?

Q. There has been no question about that, it has been in the possession of the Dependable Ladder Company since January, 1956.

(Testimony of Thomas K. Hudson.)

A. It could have been.

Q. Until it arrived at this courtroom, of course.

A. But either the defendants or the Dependable Ladder have had this, the plaintiffs have never had access to it except when you were present. [595]

* * * * *

ALICE LOVELAND

called and sworn as a witness on behalf of the plaintiffs in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please? A. Alice Loveland.

Q. And where do you reside?

A. Denver, Colorado.

Q. And what is your occupation?

A. I am an attorney.

Q. How long have you and I been associated together?

A. I hate to say it, but it is close to 25 years.

Q. Together with Mr. Button?

A. Together with Mr. Button.

Q. What arrangement do you have with me for compensating me for my time in this hearing?

A. You are to receive no compensation at all. We practice law in that manner, when one needs assistance we get in and pitch.

Q. What compensation are you going to receive out of this? A. Not a dime.

Q. You were in Yakima on March 15, 1957?

A. Yes, I was.

(Testimony of Alice Loveland.)

Q. You heard my testimony?

A. Yes, I did.

Q. Can you tell me where you were and what you did about noontime on the morning of March 15, 1957?

A. Yes, I, in the company of George Mullins, Mr. and Mrs. Wong and myself, in one car, and yourself and Mr. Splawn, in another car, drove down to the Dependable Ladder Company in Yakima, and at the Dependable Ladder Company a man by the name of Rossow, who I understood was foreman of the plant, got out the ladder at the request of Mr. Splawn, that being the ladder which is here in the courtroom at this time. At that time an inspection was made of the ladder in the presence of all the persons I have named. Incidentally, I would like to add that there were, oh, a couple of other gentlemen around the plant that were walking back and forth, but they did not participate in this at all.

You borrowed a steel rule from the foreman there at Dependable Ladder Company and the ladder was placed down across, I don't know whether it was a keg or a sawhorse, as I recall, so that the tongue part was up, but the ladder was lying horizontal and at that time you made a measurement of the play in the tongue and very carefully inspected the top assembly, and I also [597] made an inspection of the top assembly. You measured it, I did not.

(Testimony of Alice Loveland.)

Q. Everyone that you have named was grouped around this ladder? A. Yes, we were.

Q. Did I, at that time, ask Mr. Rossow anything about the safety of the ladder, if you recall?

A. I don't recall that any question was propounded to him concerning the safety, or even the word "safety" mentioned or used.

Q. Now, not from the testimony that I have given here, but from your own recollection at the time this inspection was made that you are referring to, do you recall any measurements that I gave at that time?

A. Yes, I recall the measurement in the play of the tongue and that the measurement on the play of the tongue to the left, as I recall, was approximately four inches, and to the right about nine inches, and when I say those directions, it will be as I faced the top of the ladder.

Q. Do you recall anything about that top hinge assembly?

A. Yes, I do. I was standing there and saw you measure the top hinge assembly and saw the measurement and at that time you put your thumb-nail down on the steel tape at the three-sixteenths mark and made the statement, [598] "There is three-sixteenths inches of play in this particular assembly."

Q. Now, have you looked at this ladder since it has been in the courtroom?

A. I looked at it yesterday.

(Testimony of Alice Loveland.)

Q. I wonder if you would step down and look at it now?

A. (Witness leaves the stand to inspect the ladder, and returns.)

Q. Is there any change in condition from that which you described as being the condition down at the Dependable Ladder Company plant?

A. Yes, there is.

Q. And what is that change?

A. On the left-hand side of the top assembly and, again, as I would face the top part of the ladder, there are two washers on the inside where the bolt comes through. Those two washers were not on there when I saw it in March of '57, and on the other side there is one washer on the inside, and that one washer was not there when I examined it in March of '57.

Q. Is there now any play in the hinge assembly?

A. I don't know. (Witness examines.) Well, if there is any play there, I certainly can't find it now.

Q. The fact of the matter is, Miss Loveland, those bolts in the top of the hinge assembly could be turned by a [599] finger, couldn't they?

A. Yes, at that time those bolts were very loose and just touching them could move them. At this time, or let me say when I checked them yesterday, those bolts are tight, I mean very tight, you can't even begin to budge them.

Q. Have you done anything with that tongue down there?

(Testimony of Alice Loveland.)

A. I swung it back and forth yesterday.

Q. What condition do you find that in?

A. It's much tighter than it was, and oh, without taking a ruler to measure it, my estimate would be that it swings possibly half as far in each direction as it did in March of '57.

Mr. Hudson: You may examine.

Cross Examination

Q. (By Mr. Splawn): Miss Loveland, on this March 15, 1957, occasion to which you have referred, did you make any note or notes on paper of those measurements, such as a lawyer would do, at that time of coming from Denver to see the ladder the first time?

A. I made no measurements on paper.

Q. You made no notes? A. No. [600]

Q. Of what your examination was?

A. No, I didn't write it down.

Q. Has it been customary in your handling of lawsuits and in the preparation and investigation of cases which you are to try, that you make notes of what your investigation reveals?

A. Not necessarily, it depends upon the items, and it also depends upon whether or not I know enough about it to remember.

Q. At that time did you not think that was important enough to write down and make a note of it for your file?

A. I most certainly thought it was important and I most certainly remember it.

(Testimony of Alice Loveland.)

The Court: Will counsel step up to the bench a moment?

(Whereupon, counsel approached the bench.)

The Court: I am inclined to think that you are not doing it consciously, Mr. Splawn, but you are mugging this jury, and when Mr. Hudson was testifying and Miss Loveland was testifying you had a sneer on your face and you were looking right square at the jury.

Mr. Splawn: I am sorry.

The Court: If you don't quit that I am going to call it to the attention of the jury and instruct them to [601] disregard it. Now, quit it.

(Whereupon, the proceedings were resumed in open court within the hearing and presence of the jury.)

The Court: Well, I assume, Miss Loveland, that you made no memorandum of those measurements for your file for future reference in the trial of the case? A. I made no memorandum.

Q. (By Mr. Splawn): Now, did you, yourself, do any measurements?

A. I did not hold the rule, no.

Q. And did you, yourself, handle those bolts or nuts? A. When?

Q. Oh, on this occasion to which I am referring. A. You mean in March of '57?

Q. Yes.

A. We touched the tips of the bolts, yes.

Q. Well, did you actually turn them or do anything with them?

(Testimony of Alice Loveland.)

A. We took a hold of the nuts on the outside of the bolt and they were loose.

Q. And what did you do with them when you took a hold of them?

A. Left them right there.

Q. I see. Now, as I understand, you inspected this ladder last night, didn't you? [602]

A. No, I didn't inspect it on Friday. I was present but I didn't inspect the ladder.

Q. I see. This last Monday, the opening day of trial, did you inspect the ladder?

A. No, I didn't.

Q. Did you have your witness, Mr. McDonald, inspect it?

A. I don't believe he did at my request; he may have at Mr. Hudson's.

Q. He did inspect it, however, did he not, last Monday?

A. I don't know whether he did or did not, sir. I spoke to Mr. McDonald when he came in and that is my extent of any conversation with him.

* * * * *

GEORGE MULLINS

called and sworn as a witness on behalf of the plaintiffs in rebuttal, testified as follows: [603]

Direct Examination

Q. (By Mr. Hudson): Would you state your name, please? A. George H. Mullins.

Q. And where do you reside?

A. I reside in Yakima.

(Testimony of George Mullins.)

Q. And what is your occupation?

A. I am an attorney at law.

Q. And your offices are here in Yakima?

A. My offices are in the Miller Building in Yakima.

Q. Do you recall what you did late in the morning of March 15, 1957?

A. Yes, I accompanied you and Miss Loveland to the Dependable Ladder Company to inspect this ladder which is an exhibit in this case.

Q. Who else was there at the time of the inspection, Mr. Mullins?

A. Mrs. Wong and Mr. Wong, and also Mr. Rossow, I think his name is, who previously testified here.

Q. Was Mr. Splawn there?

A. Yes, Mr. Splawn was there.

Q. Do you recall what was done at the time of the inspection? A. Well, yes I do.

Q. Will you state what was done, to the best of your [604] recollection?

A. We took the ladder down and laid it on a bench and manipulated the ladder to see what play there was in the tongue, and also manipulated the yoke or hinge, as it has been referred to, and took measurements of the swing of the tongue, took measurements of the play in the bolts of the hinge, and also measurements of lateral movement in the hinge itself.

Q. Now, do you recall what those measurements were?

(Testimony of George Mullins.)

A. My recollection of the measurements is that they were made by you using a tape which you borrowed from Mr. Rossow and you yourself made the measurements and related them to me and I watched you make the measurements and they were about three-sixteenths of an inch of lateral play, and also about that much or maybe a little more moving the yoke back and forth. "Back and forth" is not very descriptive, but moving the tongue and yoke which is on the back of the ladder, away from the steps and back to the steps.

Q. Now, do you recall any measurement of the tongue?

A. It seems to me, and my recollection is that the tongue of the ladder, in ordinary movement, moved about four inches in each direction. I don't recall your exact measurements, but when it was adjusted by taking up the slack in the bolts at the top in the hinge or yoke, [605] that it moved about maybe eight or nine inches in one direction, and maybe three or four in the other.

Q. Now, have you inspected that ladder since then? A. Yes, I have.

Q. You saw it here in the courtroom yesterday?

A. Yes, I did.

Q. Is that ladder now in the condition it was when you saw it on March 15, 1957?

A. My impression is that it is not.

Q. Would you, if you can, state in what way it is not in the same condition?

A. Well, in particular, the thing I noticed

(Testimony of George Mullins.)

which I feel is not the same as it was at that time, is the lateral play of the yoke between the two side plates of the ladder, and the difference between the metal on the hinge there at the top, and the metal side plates at the top of the ladder.

Q. There is no play there now, is that right?

A. There was not when I looked at it yesterday.

Q. Would you look at it now, please?

A. (Witness examines ladder.)

Q. Is there any play there now?

A. There is no, what I refer to as lateral play, at the present time.

Q. Did you observe how much play there is in the tongue [606] as of now?

A. (Witness examines ladder.)

Q. Is that condition changed from when you saw it in March, '57?

A. I believe that there is a little less play in the tongue now than at that time. In testing that ladder just now I swung the tongue back and forth without at first sliding it up in the play in the bolts up there, and there was about, well, maybe about four inches on one side and a couple or three on the other, and then in lifting up the tongue to get the advantage of the what appears to be wear in the bolt holes, it appeared to swing, in my judgment, about maybe seven inches to the left side of the ladder, if you were looking at it from standing up.

Mr. Hudson: You may inquire.

(Testimony of George Mullins.)

Cross Examination

Q. (By Mr. Splawn): George, do you remember on that occasion when you were out there someone taking this tongue and violently working it back and forth to see the possible condition of it (counsel Splawn shakes ladder).

The Court: I don't think you should do that again, Mr. Splawn, we might loosen the bolts at the top, and we [607] want the jury to have the ladder in its present condition.

Mr. Splawn: I didn't have that in mind at all, your Honor.

The Court: I didn't say you had it in mind, I said in looking at the ladder it could very well have that effect. All right, go ahead.

Mr. Splawn: I am sorry.

Q. You may answer.

A. Yes, it was moved back and forth. I don't recall, however, Mr. Splawn, that it was moved quite in that manner.

Q. Well, wasn't it moved to find out the maximum amount of play in that tongue, George?

A. Yes, it was.

Q. Yes, and incidentally, did you make any notes for any file of yours about any measurements?

A. No, I don't have them in any file of mine, and if I made any notes they were probably on the back of an envelope which I don't have any longer, or on a small piece of paper which I must have discarded. I looked, Mr. Splawn, for any notes which I might have on those measurements, and I don't find them.

(Testimony of George Mullins.)

Q. You were associated in the case representing the plaintiff at that time? A. Yes, I was.

Q. Did you, yourself, consider it important to record in some manner the measurements?

A. Yes, I did.

Q. But you didn't do that?

A. I didn't do it myself.

Q. Do you remember Monday when your witness, Mr. McDonald, of the Department of Labor, was here testifying? A. Yes, I do.

Q. And he examined the ladder, did he not?

A. Yes.

Q. George, you had him out there at the Dependable Ladder Company at least once, have you not, to examine the ladder? A. Yes.

Q. I see.

A. I think he has been out there twice.

Q. He has been out there twice, in fact, and that has been over a period of what time?

A. Well, let's see; well, since March 15 of 1957.

Q. George, do you remember your associate, Mr. Hudson, inquiring of Mr. Rossow as to the ladder?

A. Yes, I do.

Q. And do you remember your associate, Mr. Hudson, asking Mr. Rossow whether he thought the ladder was unsafe because of anything that Mr. Hudson had found out about [609] the ladder?

A. I don't recall that question.

Q. You don't remember that? Do you remember there was some conference between them?

A. Where, Mr. Splawn?

(Testimony of George Mullins.)

Q. On this March 15, 1957, occasion?

A. Oh, yes, I remember them at that time talking about the condition of the ladder.

Q. Don't you remember Mr. Hudson asking Mr. Rossow about the safety of the ladder and what Mr. Rossow told him?

A. Yes, I remember Mr. Hudson asking that question and Mr. Rossow giving his opinion on it.

Q. And his opinion was that the ladder was perfectly safe, do you remember that, George?

A. That is what his statement was.

Q. That is what his statement was, and that was on that very occasion, wasn't it?

A. Yes, I am sure it was.

Q. George, I assume that you are not donating your time? A. Well, I hope not. [610]

* * * * *

FRANK LYEN

called and sworn as an interpreter to interpret the testimony of the witness Kent Wong, from the Chinese language into the English language as follows:

KENT WONG

the plaintiff, called and sworn as a witness in his own behalf in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Hudson): Will you state your name, please?

The Court: Mr. Interpreter, when the questions are asked, you just repeat them, a literal, exact

(Testimony of Kent Wong.)

translation in Cantonese Chinese for the witness, and then interpret his answers when he gives them.

A. Kent Wong.

Q. (By Mr. Hudson): Where do you reside?

A. At Portland, Oregon.

Q. Where did you reside in October of 1955?

A. Cowiche, Washington, and he lives with a fellow by the name of Walter Swier.

Q. On October 17, 1955, were you in the employ of Mr. Swier? A. Yes.

Q. What was he doing?

A. He was picking apples.

Q. Were there any other members of his family picking apples? A. Yes.

Q. Who were they?

A. His wife, son and daughter.

Q. Which daughter? A. Marjory Ann.

Q. Did any member of the family have an accident that morning?

A. He said his wife fell off the ladder that morning.

Q. Did you see the accident? A. No.

Q. Were you picking on the same tree that Mrs. Wong was picking on?

A. No, he was on the second row.

Q. That is on the second row? How soon after Mrs. Wong's fall did you get to where she was?

A. He said he heard the wife call, I mean, the daughter call him, call his attention. She was going to Walter [612] Swier's home and tell Walter Swier that somebody fell off the tree.

(Testimony of Kent Wong.)

Q. And when his daughter called him did he immediately go to his wife?

A. Yes, he went immediately.

Q. Now, at the time he got to where his wife was lying, who was there?

A. Nobody else was staying but him.

Q. What position was his wife in when he arrived?

A. She was on her back, rolling.

Mr. Splawn: I didn't hear that, I am sorry.

A. She was rolling on her back.

Q. (By Mr. Hudson): Where was the ladder at that time? A. The ladder was on the ground.

Q. Pardon me?

A. The ladder was on the ground.

Q. On the ground? Were there any apple boxes around at that time?

A. Yes, there was apple boxes there that were already filled with apples.

Q. How many, if you recall?

A. He recollects there was about six or seven boxes.

Q. Were the apple boxes stacked there?

A. Yes, they were stacked.

Q. How high were they stacked? [613]

A. Three boxes in one stack.

Q. Where were these apple boxes in relationship to the ladder?

A. Well, according to him he could see the trees in front of him and stacked with, the stack of apple boxes was on the right of the tree and the ladder

(Testimony of Kent Wong.)

and his wife was on the left of the tree. The ladder was also lying on the ground.

Q. You say the ladder had fallen to the left?

A. The left of the tree, according to his position.

Q. Were the boxes of apples that were stacked three high disturbed in any way?

A. What do you mean? The ladder?

Q. If the boxes were stacked three high.

A. To push against them, you mean?

Q. Now, were they disturbed in any way, kicked around?

A. No, the apples were still stacked three high in the same position.

Q. Now, did anyone else arrive at the scene of the accident?

A. His son came after he arrived at the scene of the accident.

Q. And did anyone else get there at that time?

A. Nobody else.

Q. At that time what did you do?

A. He went immediately to Walter Swier to report it and his [614] son to follow up to the scene of the accident. Apparently the daughter never got to the house yet, he went right away.

Q. He went to the house? A. That is right.

Q. Then, did you return after going to the Swier house, to the scene of the accident?

A. Before he got to the house Mr. Walter's wife came out and started calling for her husband;

(Testimony of Kent Wong.)

called, "Walter," called, "Walter," called, "Walter."

Q. Did Mr. Wong, after he went to the Swier house, did he return to the scene of the accident?

A. Yes, he went back with Mr. Walter, back to the scene of the accident, and Mrs. Walter was on the way to the accident; half of the way she tripped and he helped her up.

Q. Now, at the time Mr. Wong returned to the scene of the accident, where was the ladder?

A. It was already set up by the time he got there, somebody set it up.

Q. Where had it been set up?

A. On the next tree.

Q. At the next tree?

A. Where the tree wasn't picked yet.

Q. A tree, you say, that had not been picked?

A. Had not been picked.

Q. Mr. Wong, did you go to the Dependable Ladder Company in Yakima on March 15, 1957?

A. Yes.

Q. Who was there at the time?

A. When he went to that company there was that table full of you and Mr. Mullins and also whoever was the manager, whoever was operating that ladder company.

Q. Everyone at this table was there?

A. Yes, and Mr. Mullins.

Q. Mr. Splawn? A. Yes.

Q. Was there an inspection of the ladder made at that time which is now an exhibit here?

(Testimony of Kent Wong.)

A. Yes, they did.

Q. Did he inspect it at that time?

A. He didn't know anything about it, he just looked at it but he didn't know anything about inspection of it.

Q. Were there any measurements taken?

A. Yes, apparently one of you on the table did measure that ladder.

Q. Does he know who took the measurements?

A. Yes, it's you, but I don't know your name.

Q. I see. Does he recall where the measurements were taken, that is, where on the ladder?

A. He saw you wiggling the bottom of the ladder to see how much leverage there was.

Q. Was there anything at the top of the ladder?

A. Yes, he was jangling the top of the ladder.

Mr. Hudson: You may inquire.

Cross Examination

Q. (By Mr. Splawn): Do you know David Swier? A. Yes.

Q. Was he picking apples in the orchard on the day of the accident? A. Yes.

Q. Do you remember how close he was picking apples to the tree where your wife had her accident? A. He don't recollect.

Q. Did you see him at the place where the accident happened?

A. After the accident happened?

Q. Immediately after the accident did you see David Swier there where the accident happened?

(Testimony of Kent Wong.)

A. After he reported the accident he saw him. After he reported the accident to Mr. Swier, then he came back, then he saw him?

Q. Was that when you returned from the house?

A. Yes. [617]

Q. When you returned from the house you saw David Swier where your wife was lying on the ground?

A. There was three persons, apparently, there when he arrived, including his son.

Q. Including his son? A. Yes.

Q. When you mentioned his son, did you mean David Swier?

A. No, his son followed him.

Q. Was David Swier at the place where your wife was when you returned from the house?

A. Yes, he was there when he returned from the house.

Q. When you left to go to the house did you see David Swier coming over to where your wife was?

A. Come again.

Q. When you left to go to the house, did you see David Swier coming over to where your wife was?

A. No, quite a distance, he didn't even see her.

Q. Who else was at the place where your wife was when you got back from the house, besides David Swier?

A. When he came back there was already two persons working on the wife's leg, putting splints on it.

(Testimony of Kent Wong.)

Q. Was one of those persons David Swier?

A. Yes.

Q. Is it not a fact that you did not go to the house until after Mrs. Swier had come out and sent you to the house? [618]

A. No, they met just about a few yards from the house, Mrs. Swier's house, then both went to the scene of the accident. She called, "Walter, Walter." She was calling for Walter, and Walter came. He met her a few yards from the doorstep.

* * * * *

ROSE WONG

the plaintiff, recalled as a witness in her own behalf in rebuttal, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Hudson): You recall, of course, the accident you had on October 17, 1955, which you have already testified about? A. Yes.

Q. Who was the first person to reach you after your fall?

A. Marjory, my daughter, had been picking on the tree and she saw it. She didn't touch me, she saw it and went on. [619]

Q. And then who next? A. My husband.

Q. And who next? A. Richard.

Q. And who next?

A. Dave Swier and Mr. Dart.

Q. Now, did anyone go to anywhere to get assistance? A. Yes, sir.

(Testimony of Rose Wong.)

Q. Who were they? A. My husband.

Q. Now, what was Mr. Dart doing for you?

A. He was taking my picking bag off.

Q. You were lying on the ground?

A. Yes. Of course, they buckle back of the shoulders so there was movement in the upper part of my body, but I was on the ground.

Q. You had removed the picking bag?

A. Yes, sir.

Q. Now, if you know, immediately following your fall, where was this ladder?

A. It was on the ground.

Q. Now, were there some apple boxes there?

A. There was apple boxes to the right of the tree. If the tree was here (indicating) and I were facing it, I was picking facing it, then the boxes were to my right. [620]

Q. How close were those boxes to the side of your ladder?

A. The apple boxes were placed along the rough road they use to pick the apples up. There is a wagon and a truck or a tractor, and they drove that tractor and wagon behind it to pick the apples up. The apple boxes are to be placed, and were placed that day, along that road. My ladder, when I was picking, was just about halfway around the tree, so the boxes lay quite, oh, I can't measure distances too well, but, well, the apple boxes would have been much farther than the length of that ladder away, about like that (indicating).

(Testimony of Kent Wong.)

Q. Now, do you know how many boxes there were there, apple boxes?

A. Well, I know there were several, yes, sir.

Q. Do you know how they were stacked?

A. Yes, they were stacked one on top of the other, to conserve space.

Q. And how high were they stacked?

A. There were some that were three high, yes, sir.

Q. Now, when the ladder was on the ground where was it in location to the boxes?

A. The boxes were to my right, the ladder had fallen to my left; I was this way, between (indicating).

Q. Now, you said that Mr. Dart was assisting you to remove your picking bag? [621]

A. Yes, sir.

Q. What at that particular time did Mr. David Swier do? A. He picked the ladder up.

Q. What did he do with it?

A. He placed it aside.

Q. Do you know where he placed it aside?

A. No, I couldn't see. He went to the back of my head and my eyes couldn't follow.

Q. He removed it from your proximity?

A. Yes, sir.

Q. Now, do you recall, Mrs. Wong, going to the Dependable Ladder Company on March 15, 1957?

A. Yes, sir.

Q. Would you tell me who was there?

A. Yes, I can.

(Testimony of Rose Wong.)

Q. Who was?

A. Myself, my husband, Mr. Kent Wong, Mr. Hudson, Miss Loveland, Mr. Mullins, Mr. Splawn, the attendant at Dependable Ladder Company, and over to one side there was one or two workmen; I don't know how many, but one or two.

Q. Do you recall what was done there?

A. Yes, I do.

Q. Will you tell me what was done?

A. The ladder was brought out and Mr. Hudson, Miss Loveland, [622] Mr. Mullins, myself, Mr. Wong, and the attendant all gathered around.

Q. Was Mr. Splawn there?

A. Mr. Splawn was there. We all gathered around and you asked for a tape measure. I didn't have it in my hands but I saw that you received one from the attendant and forthwith you measured the ladder both at the bottom, moving the tongue, and at the top.

Q. Did you, personally, observe the condition of the ladder at that time, Mrs. Wong?

A. I saw it.

Q. Did you overhear or did I state so that you did hear any measurements that I may have made?

A. I know that you had placed your finger on the tape measure. I cannot tell you how much you said, but you showed it to Miss Loveland and Mr. Mullins, but you did not show it to me, personally.

Q. Now, have you inspected that ladder since it has been in the courtroom?

A. No, sir.

(Testimony of Rose Wong.)

Q. I wonder if you would step down and look at that ladder, if you please?

A. (Witness leaves stand and examines ladder.)

Q. I wish you would observe that top assembly, if you would, please. [623]

A. Yes, sir.

Q. I wish you would state if that top assembly, as you see it now, is in the same condition as when you saw it on March 15, of 1957.

A. No, sir.

Q. In what respect is it different?

A. The bolts, the burrs, have been tightened up on the end of the bolt.

Q. Well, at least, you mean the slack has been taken out between the yoke and the side plate?

A. That is right.

Q. Or the side of the hinge and the side plate?

A. Yes.

Q. Can you conveniently move that tongue, don't do something that is going to cause you to fall.

A. (Witness moves portion of ladder.)

Q. Is the play in the tongue the same amount as the play in the tongue when you saw it in the Dependable Ladder Company on March 15, '57?

A. No, sir.

Q. Is there more or less? A. There is less.

Mr. Hudson: Just resume your seat, please. You may inquire. [624]

Cross Examination

Q. (By Mr. Splawn): I assume that on **that** occasion you were depending upon your counsel

(Testimony of Rose Wong.)

to make the inspection of the ladder, or did you actively participate in manipulating the ladder yourself? A. I saw him move it.

Q. Yes, you did not undertake to manipulate the ladder yourself, did you?

A. No, sir, I didn't.

Q. At that time did you make any close inspection of the ladder as to detail?

A. I stood very close or where I watched them do it, yes, sir, and I was very close to the top of the ladder where I could get a good view of it, yes, sir. I remember even pointing to the fact that it was loose, yes, sir.

Q. Do you find anything at the top assembly as it is now other than the tightening of the burrs, as you refer to it, that is different from what it was as you observed it?

A. I don't believe that I can tell you, I am not good at mechanical construction. I observed that it was loose.

Q. I see.

A. It's general assembly I know nothing about.

Q. On that occasion you remembered the ladder was the one which you had been using?

A. Yes, sir.

Q. And do you remember when using it it was that loose? A. Beg your pardon?

Q. Do you remember that the ladder, when you were using it to pick apples, was that loose, as you have described it?

(Testimony of Rose Wong.)

A. Had I observed a flaw in the ladder, I certainly would have told him, sir.

Q. Yes, you observed none?

A. Not to the minute inspection, no, sir. [626]
* * * * *

Q. In your use of the ladder, while you were using it did you observe any looseness?

A. I observed nothing that I felt would cause me to think that the ladder was, there was something wrong with it, no, I didn't.

Q. And as you set the ladder and used it to pick apples during the course of that apple picking season up to the date of the accident, there was nothing up there that caused the ladder to be such that you felt unsafe on it?

A. That ladder wasn't in continuous use with me.

Mr. Hudson: If your Honor please, she just can't answer those questions. She doesn't know. If she had a ladder, she took it, she is not a mechanic, she doesn't know whether there is a defect or not.

The Court: I think she said she didn't have that ladder in continuous use.

Mr. Splawn: May I make another question?

The Court: All right.

Q. (By Mr. Splawn): While you were using the ladder was [627] there any looseness of it that you observed at all?

A. I observed nothing to make me think that

(Testimony of Rose Wong.)

the ladder was not usable at that time, if it had been so, I would have told them.

Q. Well, during the time that you did use this ladder were you conscious of any looseness of the tongue or the top assembly?

A. I hadn't observed it closely.

Q. Well, were you aware of it?

A. I knew it as we did every ladder we used that way.

Q. Well, would you answer my question, please, Mrs. Wong. Were you aware while you were using the ladder of it being loose at all in the top assembly?

A. I was not aware of the looseness. [628]

* * * * *

ROBERT I. BOUNDS

recalled as a witness on behalf of the defendants in rebuttal, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Splawn): Will you please state your name? A. Robert I. Bounds.

Q. And what is your profession?

A. Attorney at law.

Q. And with whom are you associated now?

A. With Mr. Splawn.

Q. Are you interested in this present lawsuit in any fashion?

A. Not financially; other than a bystander.

Q. Do you appear as an attorney of record in this case? A. I do not.

(Testimony of Robert I. Bounds.)

Q. When this case was commenced do you know whether or not you were then associated with me as a partner? A. I don't believe so.

Q. Bob, this last Monday morning what did you and I do with [629] respect to a ladder?

A. Well, you picked me up in your station wagon at my home at eight o'clock in the morning.

Q. This was last Monday morning?

A. This was last Monday morning.

Q. All right.

A. And we went to the Dependable Ladder Company.

Q. And who was there?

A. You, myself, Mr. Rossow, and there were some workmen in the shop whom I do not know.

Q. And when you got there, what took place?

A. We took the ladder out of the shop and put it in the station wagon.

Q. Incidentally, where the shop was, do you remember as to how the door was, whether it was locked or unlocked? A. The sliding door?

Q. Yes.

Mr. Hudson: If the Court please, I don't believe that makes any difference. At eight o'clock in the morning most places are unlocked.

The Court: I beg your pardon.

Mr. Hudson: The average manufacturing place is unlocked.

The Court: Well, he may answer.

A. It's my recollection that the door, the sliding door, [630] is a bolt latch, if my recollection is

(Testimony of Robert I. Bounds.)

correct, and that the bolt was in a locked position, that is my recollection.

Q. (By Mr. Splawn): Do you remember a padlock that someone had to open?

A. I frankly don't recall.

Q. I see. Well, then, what did we do?

A. Well, the ladder was inside the shop beyond the office, it was on the north wall up against the wall with the tongue facing out (indicating). We picked the ladder up and put it in the station wagon.

Q. In that position where the ladder was as you have just testified, the previous week on any day had you seen that ladder in the same position?

A. Yes, it was in the same position.

Q. And on what day was that?

A. I believe it was Wednesday. That was the day that Mr. Hudson and Miss or Mrs. Loveland were there.

Mr. Hudson: I will stipulate that that gentleman was down there with us on Friday. He was good enough to accompany us because Mr. Splawn was tied up. That was Friday of last week.

The Court: All right.

Q. (By Mr. Splawn): You were there on the occasion when Mr. Hudson and Miss Loveland were there looking at the [631] ladder?

A. Yes, that is correct.

Q. Were you there all the time with them while they were inspecting the ladder last Friday, if that is the date?

(Testimony of Robert I. Bounds.)

A. There was probably about a minute and a half when—the office of the Dependable Ladder Company is separated by a partition from the shop, a glass door—they were probably a minute and a half in there when I was still in the reception room but I could see them in the other room; I was with them there at all times.

Q. When we picked this ladder up Monday morning, as you have testified, was the ladder when you picked it up in the same place and position it was when it was left on the Friday occasion when you were there?

A. Yes, in the same position, the same place.

Q. Well, we put the ladder in what, then?

A. In the back of your station wagon.

Q. What else did we put in there?

A. We put in three boxes of dirt, a coil of baling wire and a box of apples and a picking bag.

Q. And where did we go?

A. We came directly to the courthouse here and parked on a side street in a meter zone.

Q. I see. Do you remember being present in my office on Friday afternoon late when Mr. Hudson and Miss Loveland [632] were in my office?

A. If the date was Friday, I recall the time.

Q. Mr. Hudson said it was a guess, there is no dispute about it, Bob, do you remember Mr. Hudson asking whether or not we would see to it that the ladder was brought to the courtroom?

The Court: That is a little leading.

(Testimony of Robert I. Bounds.)

Mr. Splawn: Well, I am sorry if it is, your Honor.

The Court: You can ask him. I don't think there is any question about that, is there?

Mr. Hudson: Oh, no, I will stipulate that I said to him, "Homer, be sure that ladder gets up to the courthouse Monday."

The Court: All right, let's move along with this, I think we are taking too much time.

Mr. Splawn: I am very sorry, I am trying to go as fast as I can.

Q. What did we do after we got it out to the car?

I don't want to lead, your Honor.

The Court: Well, ask him what you did. He is an attorney, he can tell you.

Mr. Splawn: I know, I am sorry I am holding things up.

A. We took the ladder out of the car, you carried the ladder up, I was on the end to watch that it didn't hit [633] anything as we were coming up the stairway, brought the ladder up and it was put into the corridor on the south end of this courtroom and we made several trips up bringing the rest of the baling wire and apple boxes and dirt, and nothing was done to the ladder. It was set and placed there.

Q. (By Mr. Splawn): Did we leave at the same time or not?

A. I think we did, my best recollection is we both went back at the same time. [634]

* * * * *

Mr. Hudson: Well, this is the only time that we can present a motion for a directed verdict, is it not?

The Court: Yes, I think that is correct.

Miss Loveland: May it please the Court, at this time on behalf of the plaintiff we wish to ask the Court for a peremptory instruction directing a verdict in favor of the plaintiff and against the defendants Swier in this case in accordance with the plaintiffs' contentions as set forth in the pre-trial order. This motion is founded upon a failure of any evidence upon which reasonable people [655] could differ or upon which any other inferences could be drawn other than inferences in favor of the plaintiff.

And, secondly, as a matter of law, on taking up the matter of law, we have to keep in mind, first, the admissions of the parties here and the elements which are necessary to be proven before plaintiff can recover.

We have an admitted fact that she was an employee of the defendant and an admitted fact that in the course of her employment and using a ladder furnished by Mr. Swier she sustained a fall and that an injury resulted. We also have the major admitted fact that it was the duty of the Swiers to furnish her a safe ladder. All of those things are admitted, so we have only two elements left which the plaintiff must establish before she is entitled to recover. One is, of course, the measure of her damage, and that measure of damages, there has been no evidence of any kind offered to contra-

diet or dispute that in any way. They have not even, no attempt was made, they have therefore accepted it, the damages, as the plaintiff and her witnesses have testified to them.

Then, we come to the very important and crucial thing here, and that is the ladder itself and the safety of that ladder. It is our position here that as a matter of law we are entitled to this directed verdict because the defendant's own evidence brings forth two legal [656] propositions, both of which resolves in the plaintiff's favor. The first one is an admission on their part. I would like to say that there is no exception from any of the decisions of the State or Federal Courts that I was able to find in instances where a party either directly or indirectly, by fraud, by fabrication of evidence, by tampering with evidence, by altering the evidence, there is not one single case which doesn't follow and state the rule that is laid down, the well-settled rule that all efforts by either party to a suit directly or indirectly to destroy, fabricate or suppress evidence is in the nature of an admission that the party has no sufficient case unless aided by suppressing evidence or by the fabrication of more evidence. That particular citation was from *Silver vs. Northern California Power Company*—162 Pac. 412. The very same rule is stated in a Circuit Court of Appeals case in the 9th Circuit, it is *Silverbaum vs. U. S.* arising in the 9th Circuit, appearing in 94 Fed. (2d) at page 74, and this particular language appearing at page 762. That case, just informational-wise, concerned the

alteration of logs on a ship, and at the time of trial the matter of alteration was presented by way of evidence, and this is the language of the court, which becomes very important to show that it is not only an admission but also raises a presumption, but here it is: [657]

“Once you find there has been tampering with the log, as the court has said on many occasions, the court looks with suspicion at the whole matter and without exception each case holds that such conduct was with the consciousness of guilt an admission that the original was defective and was adverse to their interests.”

We have first, then, by reason of law, and their witnesses, their own witnesses, an admission then by operation of law that they have no defense here unless something was done to the evidence. Then, once this evidence comes in showing an alteration, a fabrication, then we have a legal presumption arising, a legal presumption which the defendant then must offer evidence to overthrow or rebut, otherwise that presumption stands as a matter of law.

I would like to again read from the Silver case vs. the Northern California Power Company. Incidentally, that was a case which involved some defective electric wire, and at the time of trial the wires were brought in as evidence and there was testimony to the effect that those were not the wires which were actually involved in the fire or the burning, and this is what the court said:

“The fabrication of evidence is calculated to raise a presumption against the party who has recourse

to such practice not less than when evidence has been suppressed or withheld." [658]

Going to the Ninth Circuit case, which also sets forth the presumption, and it uses this language:

"The importance of a log in determining marine causes has always been recognized in courts of admiralty. The alteration of log books by alteration and substitution has long been condemned. It not only casts suspicion on the whole case of the plaintiff but creates a strong presumption that the erased matter was adverse to their own testimony."

We now have by their own testimony a presumption that the plaintiff has changed the evidence in this case. We have Wigmore on "Evidence", page 120, at Sec. 278, the following language:

"It has always been understood, the inference, indeed, is one of the simplest in human experience, that a party's falsehood or other fraud in the presentation of his cause, the fabrication in the presentation of evidence by bribery or spoliation——"

and certainly we have that here in the testimony concerning alterations:

"——and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference, thus, does not apply itself necessarily to any specific effect in the case but operates [659] indefinitely and strongly against the whole mass of alleged facts constituting his case."

The testimony of the alteration, the testimony that by their witnesses, that the ladder at this trial is not in the same condition as it was when these people first saw it, does not affect just that alone, it goes to every fact, everything in these defendants' whole case.

There are numerous Federal cases in which the very same rule has been repeated and repeated over and over again, setting forth those two elements that, first, it is an admission on that party's part that he has no case or he has no defense; secondly, once that testimony is in, and keeping in mind the defendants' own testimony, then we have a presumption which no evidence here has been offered in any way to rebut or overthrow.

We have *Harvey vs. the United States*—215 Fed. (2d) 330. *U. S. vs. Kelly*—219 Fed. Sup. 217. *Wilson vs. U. S.*—162 U. S. 13. *U. S. vs. Warren*—160 Fed. (2) 438. In each of them they say that the fabrication of any evidence to establish a case or to establish evidence, if it is criminal, is cogent evidence either that they have no defense, they have no case, or if it is criminal, it's evidence of guilt.

So, here we have those two things on which no [660] evidence or testimony of any kind has been offered. We have by operation of law an admission that they had no case unless there was some change in the evidence, and too, a presumption right there that they had none, and once that presumption comes into being, and it is by the decision of the Circuit Court, then they must rebut or over-

throw that by stating the next step in going forward, which hasn't been done.

We feel that under these circumstances that the Court should give a peremptory instruction directing a verdict in favor of the plaintiff in the case.

The Court: I think the motion should be denied at this time. I think it makes quite a difference whether the case is one before the court, as the admiralty cases must be, or before a court with a jury, and it depends upon the jurisdiction to a considerable extent. [661]

* * * * *

Court's Instructions to the Jury

The Court: Now, Gentlemen of the Jury, before I proceed with these formal instructions, I think I should give you a word of explanation if not of apology for their length and perhaps, complexity. I know it's particularly difficult in Federal Court when you don't get a typed copy of the Court's instructions, as you do in State Court. It isn't the practice here, they are given to you orally and read to you, and then you have to remember them as best you can, and I know that puts a very heavy burden upon human memory, but in a case of this kind presents a good many questions of law. It's my duty to instruct you concerning them fully and accurately, as accurately as I can.

And another thing that perhaps jurors do not appreciate, and that is, as you have been told and will be [663] told again by formal instructions, the jurors are the sole and exclusive judges of the facts. Now, where there is conflicting testimony and con-

flicting evidence, I have no means of knowing how you are going to resolve that conflict and for which side you will finally find, so far as the facts are concerned. So that it is my duty to give you the theories of both sides so far as the law is concerned, and I must instruct you, on the one hand, what would be the result if you find for the defendants' version in certain particulars or, on the other hand, what would be the result if you find for the plaintiffs. That is the reason that I am obliged to give some of these instructions that might, at first blush, seem to be inconsistent. I don't think that they are if they are viewed in that light.

Now, before I start out, too, I think I should say that while I am not trying to detract from my formal opinions or from my formal instructions which it is your duty to follow as best you can, I think it might help you and I would say aid you, so far as the question of liability is concerned, aside from the question of damages, that this case is neither so complex, in my judgment, and so complicated as the volume of evidence and the length of time that was spent here would indicate. Basically, your problem here is to find from this evidence whether Mr. and Mrs. Swier, the defendants, furnished a reasonably safe [664] ladder to Mrs. Wong to pick these apples. If they didn't furnish a reasonably safe ladder and as a direct result of it Mrs. Wong fell with the ladder or it fell with her and she was injured, then the defendants are liable to her in whatever you find to be the reasonable and proper damages for the injuries, assuming

that the defenses here of assumption of risk and contributory negligence have not been established as I will define those to you in the course of these instructions.

If, of course, either of the defenses has been established, then you should find for the defendants.

Now, it is my duty to instruct you as to the law of the case and it is your duty to follow my instructions. A Judge of a Federal Court has the right, if he chooses to exercise it, to comment on the evidence, but I am not going to try to invade your functions, and I will not consciously make any extended comments on the evidence. If I should do so, however, I want you to remember that while it is your duty to follow my instructions as to the law, you may consider, but you are not obliged to follow, any comments that I may make as to the facts of the case or what the facts indicate or show on that point. On that point you are the sole judges.

Your verdict should be based only upon these instructions and upon the evidence admitted in this case. [665] You should not consider the financial ability of the one or the necessities of the other; neither should sympathy or prejudice have any place in your deliberations, for all parties are equal before the law and all are entitled to exact justice.

The order in which the instructions are given has no significance as to their relative importance, and you should not single out any particular in-

struction and place undue emphasis upon such instruction, but should consider the instructions as a whole.

Now, the jury, as I said before, has the sole responsibility and duty to decide questions of fact from the evidence, and the judge has the sole responsibility and duty to decide questions of law.

As I have heretofore informed you, I have dismissed from this case the defendants Dr. James E. Zimmerman and the Yakima Valley Memorial Hospital Association, for the reason that I concluded from the evidence submitted that only questions of law were involved as to them, and I decided those questions in their favor. There remains for your consideration, then, only the issues as between the plaintiffs Rose Wong and Kent Wong, and the defendants Walter Swier and Laura Swier, his wife. For convenience in giving you these instructions I shall refer to defendants Walter Swier and Laura Swier as if they were the only [666] defendants in the case, since they are the only remaining defendants herein, and when I say "defendants," therefore, I mean defendants Swier and wife. Also, hereafter, as a matter of convenience, I shall refer to Rose Wong as if she were the only plaintiff. You are to decide the issues just as if the Swiers had been the only defendants from the outset of the trial. You are not to draw any inference whatsoever, either in favor of or against the Swiers because I have dismissed Dr. Zimmerman and the hospital from the case.

The pre-trial order which is approved by the at-

torneys for the parties and signed by the judge of the court prior to the commencement of the trial, sets out the admitted facts, the contentions of the parties and a statement of the issues of fact which it is your duty to decide. The admitted facts which I shall recite to you, are to be taken by you as established, as it is not necessary to produce any testimony or evidence to prove an admitted fact.

Admitted facts in the present case are as follows:

Plaintiff, Rose Wong, was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and as such employee she used a ladder furnished by the defendants. The defendants were under a duty to furnish [667] plaintiff a safe ladder. Plaintiff sustained injuries by reason of a fall from the ladder in the course of her employment.

The contentions of the parties are only what they claim and hope to prove. They are not evidence and should not be considered as such.

The contentions of the plaintiff are as follows:

The ladder furnished to plaintiff Rose Wong by the defendants Swier, was unsafe, defective and dangerous, of which fact plaintiff was ignorant. Defendants knew the defective and dangerous condition of the ladder but failed to warn the plaintiff of its condition. The defective and unsafe condition of the ladder included, but was not limited to: (a) The metal plate and bolt assembly at the top of the ladder was defective and (b) The tongue of the ladder was defective. The plaintiff's fall was proximately caused by the defective condition

of the ladder, and by reason thereof she sustained a compound, comminuted fracture of the left ankle which involved the distal end of the shaft of the tibia and fibula, and was otherwise injured. As a proximate result of the negligence of the defendants, plaintiff has sustained permanent injuries and disabilities, consisting of a shortening of the left leg, permanent and severe scarring, permanent and continual pain, and will be prevented from carrying on [668] any occupation and from caring for her family, and has suffered and will continue to suffer great pain of body and mind. Plaintiff claims special damages in the amount of \$3392.57 and general damages in the sum of \$97,600, and contends that she will continue to incur expenses for medical attention, hospitalization, drugs and orthopedic appliances.

The contentions of the defendants are as follows:

Plaintiff assumed whatever risks were entailed in the condition of the ladder or the use made or expected of it. Plaintiff, in the use of the ladder, was negligent in that she endeavored to use it while she was in an unbalanced position, endeavoring to pick fruit at an angle and at a distance from the ladder, so as to cause her and the ladder to become unbalanced and fall; or, that because of the way in which she fell and the ladder fell, she did not set it properly in the first instance; or, in the use of the picking bag, she positioned it so that it obstructed or impaired the use of the ladder, and put her in an unbalanced position with respect to the ladder; or she was not attentive to

the fact that she was in an unbalanced position; or was not paying sufficient attention to the fact that in the use of the ladder she could not extend her body to the degree and angle which she must have done; or, she permitted herself to slip on the rung of the ladder [669] on which she was standing so that she did not have a firm footing.

The issues of fact which it is the duty of the jury to decide in this case are as follows:

(1) Was the ladder furnished by the defendants so defective and unsafe in the respects claimed by the plaintiff that it was not a safe ladder for the use for which it was intended and furnished?

(2) Did the plaintiff, Rose Wong, assume the risk of the defective and unsafe condition of the ladder, if any, and the risk of using the ladder in its actual condition?

(3) Was the plaintiff negligent in the use of the ladder in the respects contended by the defendants?

(4) If plaintiff sustained injury as a proximate result of the negligence of the defendants, what is the extent and character thereof, and in what amount should she be compensated therefor?

The plaintiff has the burden of proving by a fair preponderance of the evidence the contentions as above stated, that the defendants were negligent in furnishing her a defective and unsafe ladder for her use in picking apples; and the defendants have the burden of proving by a fair preponderance of the evidence their contentions that the plaintiff assumed the risk of using the ladder,

and [670] that there was contributory negligence on her part—that is to say, that her own negligence proximately and substantially contributed to cause her fall and resulting injury.

The term “proximate cause” means that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened.

The term “fair preponderance of the evidence” means the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses, but means that evidence which carries the greater convincing power to your minds.

The term “burden of proof” means the burden of producing evidence which fairly preponderates over the opposing evidence.

“Negligence” is the failure to exercise reasonable and ordinary care and by the term “reasonable and ordinary care” is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions. Negligence may consist in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances.

“Contributory negligence” is negligence or want of care, as herein defined, on the part of a person suffering injury or damage which proximately contributes to cause the injury and damage complained

of. Contributory negligence bars recovery on the part of a person suffering injury or damage, even though the opposing party is guilty of negligence.

Now, a master or employer has a positive duty to warn an employee of a hidden or latent danger, danger about which he knows or in the exercise of reasonable care should have known, existing in the tools or instrumentalities furnished by the employer for the employee's use, and this duty extends to all dangers in connection with the work or tools and instrumentalities of which he knows, or in the exercise of reasonable care, he should have known, which are not obvious and apparent to the employee.

You are, therefore, instructed that if you find by a preponderance of the evidence that defendants knew, or by the exercise of reasonable care should have known, that the ladder was not safe for use by the plaintiff and that such use was dangerous or likely to become dangerous when used, and that danger was neither obvious nor apparent to the plaintiff, then you are instructed that the defendants Swier had a positive duty to warn the plaintiff of said danger, if any, and if they failed in this respect, [672] I instruct you that they were negligent, and if such negligence was a proximate cause of plaintiff's injuries, your verdict should be in favor of the plaintiffs, unless you find that recovery by plaintiff is barred by contributory negligence or assumption of risk.

If you find by a fair preponderance of the evidence and under the Court's instructions that the plaintiff was negligent and that negligence, if any,

proximately and substantially contributed to cause her fall, then your verdict should be for the defendants.

Now, you gentlemen are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of the witness you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to receive. [673]

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except insofar as the same may be corroborated by other credible evidence in the case.

Now, evidence of any oral admission claimed to have been made outside of court by any party in a civil case such as this ought to be viewed with caution.

Now, you have heard the testimony of witnesses

who have given evidence and testified as experts in this case. This class of testimony is proper and competent concerning matters involving special knowledge or skill, or experience upon some subject which is not within the realm of the ordinary experience of mankind and which requires special research and study to understand. The law allows those skilled in that special branch to express opinions and upon a hypothetical state of facts stated to them to say whether or not, according to their experience and research, a fact may or may not exist. But nevertheless, while their opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. The jurors are not bound by the testimony of the expert; his testimony is to be weighed as that of any other witness; just as far as his testimony [674] appeals to your judgment, convincing you of its truth, you should adopt it; but the mere fact that the witness was called as an expert and gave opinions upon a particular point, does not necessarily obligate the jury to accept his opinions or conclusions.

An employer has a duty to provide his employee with reasonably safe tools and appliances for the use required of them, and it is the employee's duty to exercise due care to avoid injury. These duties are reciprocal and exist by implication based upon the contract of employment. The implied duty of each is measured by the standard of ordinary care. The employer discharges his duty when he provides tools or appliances that are of ordinary character

and reasonably safe. He is not required to provide the newest and best.

The defendants were under a duty to furnish to Rose Wong a reasonably safe ladder for her use in her employment.

If you find from a preponderance of the evidence that the ladder furnished by defendants was not a reasonably safe ladder but was defective and that as a result of such defective condition of the ladder, plaintiff fell and sustained injuries, then you are further instructed that the defendants are responsible not only for the injuries sustained by plaintiff as a result of the fall from the [675] ladder, but that defendants are further responsible for any damages or injuries resulting to her by reason of the subsequent negligent acts or conduct, if any you find, of Dr. James E. Zimmerman and Yakima Valley Memorial Hospital Association, or either of them, in the care and treatment of the injuries sustained by said plaintiff as a result of the fall from the ladder.

Now, a plaintiff who is contributorily negligent, as such term has been defined to you, cannot recover from the defendants, irrespective of negligence, if any, on the part of the other party, the defendants.

A master must be held to be aware that, if he permits the appliances which he furnishes to his employees, for their use in the conduct of his business, to become defective, his employees in using the same in the reasonable and necessary course of their employment are likely to suffer.

One who, as servant or employee, enters into the service of another, assumes by his contract of employment the risk of all dangers ordinarily incident to the work upon which he engages, and also the extraordinary risks of employment if they are open and apparent, although due directly to the master's negligence.

If you find by a fair preponderance of the evidence and under the Court's instructions that the plaintiff [677] assumed the risk of what befell her, then she cannot recover from the defendants Swier, irrespective of negligence, if any, on their part.

Now, every accident does not necessarily establish a cause of action warranting recovery by the injured party. Accidents may occur for which no one is to blame.

An unavoidable accident is an unintended occurrence which could not have been prevented by the exercise of reasonable care. There is no liability for unavoidable accidents.

If this accident should be considered by you to have been unavoidable, then you should return a verdict for the defendants.

Now, if you return a verdict for the plaintiffs, then in the determination in the amount of the verdict, you should not indulge in speculation or conjecture, nor be swayed by sympathy or prejudice, but should be guided wholly by the evidence and law. Damages awarded should be compensatory. That is to say, you should award such an amount as in your judgment will fairly and adequately

pecuniarily compensate the injured person for the loss and damage sustained.

According to mortality tables, a woman of the age of Rose Wong, who on October 17, 1955, had attained the completed age of 45 years, has a life expectancy of [678] 25 years and 77 days.

It is proper for you to consider the life expectancy of Rose Wong in arriving at your verdict. However, it is not to be understood by you as a conclusive formula for mathematical computation of damages.

Her life expectancy, according to the mortality tables, may be considered together with all other evidence as to health, constitution, habits and occupation of Rose Wong.

Now, before I give you this instruction on the measure of damages, I wish to comment briefly that this instruction is not intended to indicate in any way what I think should be your verdict. I have no means of telling in advance whether you will find that the plaintiff is entitled to recover or find for the defendant. In case you do find for the plaintiff, then, of course, you will have use for these instructions as to measure of damages. For that reason I give them to you now.

If from the evidence and these instructions you find that the plaintiffs are entitled to recover, then you will award damages in such amount as in your judgment will fully compensate Rose Wong for the injuries and damages which she has sustained. In assessing such damages, you shall take into consideration the nature and extent of her injuries, the

physical and mental pain and suffering endured [679] by her prior to the time of this case, and the reasonable expenses for medical, hospital, nursing, drugs and orthopedic appliances, all insofar as the above items have been established by a preponderance of the evidence. You are also instructed that if you find that plaintiff has established by a preponderance of the evidence that she will necessarily endure in the future physical and mental pain and suffering resulting from said injuries, or that she has incurred any permanent injury or disability as a result of said injuries, or that her earning power or capacity for the future has been impaired as a proximate result of said injuries, then the law leaves it to the sound discretion of the jury to fix the amount of damages, taking into consideration those of the above items which have been established by a preponderance of the evidence.

In no event shall you bring in a verdict for more than or in excess of \$100,000, the amount asked for by the plaintiff in the pre-trial order.

Now, in arriving at your verdict, if you should find for the plaintiff, you are not permitted to add together different amounts representing the respective views of different jurors and to divide the total by twelve, or by some other figures, intending to represent the number of jurors or ideas represented. Any such figure would result in a "quotient verdict," would be contrary [680] to law, and would be in violation of your oaths. You are, of course, to give consideration to each other's views and reasoning and honestly endeavor to reach a

verdict, but such common agreement is to be based upon the final, honest belief of the jurors and must not be arrived at by that mechanical process of addition and division which constitutes a quotient verdict.

During the course of the trial I have occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony or not brought out clearly as I thought, anyway. Do not assume that because I, as Judge, have asked these questions, or participated to that extent in the trial, that I hold any opinion on the matters to which my question related. Remember at all times that the jury are at liberty to disregard all comments of the Judge in arriving at their own findings as to the facts, from the evidence in the case.

It is the duty of the Judge to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure. You are to draw no inference against the side to whom an admonition of the Judge may be addressed during the trial of any case.

It is the duty of attorneys on each side of a [681] case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. It is the duty of the Judge to decide whether under the rules of evidence such testimony or other evidence may be received.

Whenever the Judge sustains an objection to an offer of evidence, the jury are not to consider in their deliberations either the offer or the objection,

or the ruling the Judge in rejecting the offered evidence.

Thus, when the Judge sustains an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer. Nor may the jury assume an attorney has objected to a question because he expected the answer, if given, would be unfavorable to his side of the case.

By allowing evidence to be introduced over the objection of counsel, the Judge does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jury are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

I might also say that I tried to be fair and impartial in this case. I haven't intended to indicate what I thought your verdict should be or I haven't intended [682] to favor one side against the other. If anything I have said or done in the course of this trial should give you that impression, please wipe it from your minds and disregard it, because I have not intended to give any such impression.

Now, just a word about your deliberations here: the verdict, as I have said before, when it is finally agreed upon should reflect the best judgment of each individual juror, but you don't have to have very much experience in human affairs, and you men are experienced individuals, to appreciate that

no twelve people could agree upon any important question unless there is a good deal of spirit of give and take. And, of course, these issues have to be decided by juries, and in a case of this kind in Federal Court the verdicts have to be unanimous, so that my only suggestion is that you approach the question of decision in this case, the bringing in of your verdict, with an open mind and a cooperative spirit, and listen to what your fellow jurors have to say and consider what they have to say, although, of course, the final responsibility is on you and you should feel that the verdict represents your judgment when you agree to it. I would suggest, too, that it is best not to express too strong an opinion one way or the other when you first go into the jury room, because very often somebody says, "Well, I think so and so," [683] a matter of personal pride enters into it, and it is difficult to get them to change around and perhaps embarrassing for them to change, so I think that you should always, before making up your minds, discuss the matter openly and freely and have consideration and regard for the views of your fellow jurors.

Now, upon retiring to the jury room, the first thing you should do is select a foreman who will be, in effect, your chairman, and preside over your deliberations, and sign the verdict when you have agreed upon it.

You will take with you to the jury room the exhibits which have been admitted in the case, including the ladder here, if you want to take it in

and look at it, and also forms of verdict which have been prepared by the Clerk for your convenience, and these verdicts are very simple; they have the heading of the case and then one of them says, "We, the jury in the above entitled cause, find for the plaintiff in the sum of \$." If you choose that verdict you assign the amount which you decide to be the fair and proper award for the plaintiff's compensation and injuries.

The other verdict reads, "We, the jury in the above entitled cause, find for the defendants." You use this verdict in the event you find for the defendants. In any event, the foreman should sign the verdicts, and [684] if you agree upon it you will let one of the bailiffs know that you are ready to reach a verdict. I think you all understand that twelve of you must agree in order to reach a verdict.

I will ask the jury to step out for the time being.

(Whereupon, the jury retired from the courtroom.)

The Court: I had the jury step out so that counsel, in the jury's absence, may state their exceptions to the Court's instructions or failure to give proposed instructions.

Miss Loveland: If the Court please, we would like to except to the giving of the instruction concerning unavoidable accident, contributory negligence and assumption of risk, for the reason that not one of those are issues in this case nor has evidence been presented concerning them which would make them issues. As for the contributory

negligence only, there were not even hypothetical questions asked of an expert witness which would bring this into the case and make it an issue.

I would also like to except to that portion of one of the instructions which related to the newest and best type of equipment and appliances, for the same reason, that it has not been the contention of the plaintiffs at any time that they were required to furnish the newest or [685] best, nor is that an issue in this case.

We would like to enter our exception to the Court's failure to give or declining to give Plaintiffs' Requested Instructions Nos. 19, 20 and 21, inasmuch as we believe they set forth a correct statement of the law in this case.

The Court: Mr. Splawn?

Mr. Splawn: The defendants except to that portion of that instruction relating to the proposition that if the jury should find that the defendants were negligent that such instruction should be limited to the issues stated in the pre-trial order rather than in general to bring in other possible issues than contained in the pre-trial order.

The defendants except to that portion of the instruction which reads in effect as follows: That if the jury should find that the ladder was not reasonably safe that there should be deleted the other words immediately following which add other requirements, namely, the use of the word "defect" in addition to the term "reasonably safe."

The defendants except to the failure to give that

portion of their Proposed Instruction No. 10, reading as follows:

“An employer complies with his duty to provide reasonably safe tools or appliances [686] when he furnishes the employee with such instrumentalities as are in common use without radical defects in themselves even though it may be shown that there were better appliances for the particular purpose.”

The defendants except to the instruction concerning the duty of an employer or master to warn concerning latent dangers, in that such instruction should be limited to those dangers which constitute or would constitute negligence or would in the minds of the jury constitute less than the standard by which the employer is judged in the furnishing of a tool or appliance. [687]

* * * * *

Yakima, Washington, Monday, May 19, 1958
10:00 o'clock a.m.

(Argument of counsel in the matter of Wong vs. Swier, Civil No. 1137, Motion to Set Aside Verdict or in the Alternative for a New Trial.)

Oral Ruling of the Court

The Court: This case presented matters of unusual difficulty. I think we started having difficulty with it at the pre-trial conference, in getting the pre-trial order settled. I very carefully considered these authorities and cases that plaintiffs' counsel submitted here, and I don't believe they justify the assertion or contention that because there is evidence which the jury may believe that

there has been a tampering with or alteration of some piece of physical evidence in the case, that that would warrant the trial court in taking matters into his own hands and finding contrary to the verdict of the jury, entering a judgment in favor of the plaintiff and assessing the amount of damages or granting the amount that is asked for in the complaint.

In the first place, the very fact as to whether [692] there had been an alteration of this ladder by tightening the bolts was disputed. It presented a factual conflict. It's true that at least one witness, I believe it was Clark, for the plaintiff, testified that it was in a different condition than when he examined it, but under the modern practice and certainly the practice in Federal Courts, we no longer make a party responsible for the testimony of his witnesses whom he may call. He has the privilege of questioning his own witnesses or, if there is a conflict, the trier of the facts should decide that conflict, and I particularly recall the name of a witness now, I haven't my trial notes here, but the man who was in charge of this warehouse where this ladder was kept, what was his name?

Mr. Hudson: Rossow.

The Court: He testified, positively, that there had been no alteration.

Mr. Hudson: If the Court will pardon me, his testimony was that at the time I had been down there the looseness could be measured, but that at the present time the looseness could not be meas-

ured, that it had been altered. That was his testimony.

The Court: I think that at one point he testified that, it seems to me that there was testimony that it could be construed that there hadn't been any change.

Mr. Splawn: One witness, Mr. Moritz from Zillah, [693] who testified—he was my last witness—he had examined it a couple of weeks before the opening of the trial, and he said it was the same.

The Court: So that I felt that there was a factual conflict and a factual question to be decided by the jury. It's true that it appeared to me as being a rather one-sided one. If I had been the trier of the facts I would have found that there had been a change in the ladder because I think the evidence was to me very convincing and overwhelmingly so in favor of there having been some tightening of those bolts. How or why I could only conjecture, of course, and I think perhaps it would be fair under these authorities to ask that an inference be drawn against the defendants because of that situation of alteration of the ladder, and certainly that was done just about as skilfully, as forcefully, as I have ever heard anything done in a court of law. Capable counsel took full advantage of the circumstances of the alteration of that ladder and didn't let the jury forget it for an instant. I thought it was very forcefully presented.

If I grant a new trial, which is the only thing I could do here, I don't think I could take these matters into my own hands here and find out the

circumstances and assess the damages. I don't think that it would stand until it got to the Court of Appeals. If I did grant a [694] new trial I can't put that ladder back in the circumstances it was. The only thing we could do is put it back in here and present it to another jury. I don't think it could be presented any more forcefully than it was. Perhaps there could have been more favorable instructions presented to the jury, but in view of the situation here I don't believe there was any error in those instructions as I gave them. There were grave elements of weakness in this case from the jury's standpoint. I think rather than to say that the jury disregarded the alterations, I think it's just as logical and perhaps more so, in the light of the evidence here which I followed very closely, I think it would be just as logical and fair, I think, to assume that they did find an alteration and probably didn't like it any better than I did.

I don't like the tampering with evidence here in a case in any court of law, but I think it is just as logical to assume that they found that even if the ladder was in the condition which the witness said it was, as you claimed it was before that alteration, it was still a reasonably safe ladder and that its defect was not the cause of Mrs. Wong's fall and her injuries. Her testimony wasn't very convincing in the light of the inconsistent statements that she had made before, and I think, well, while I don't want to stress that point too much, I think [695] it's a matter of human nature to be

disappointed, particularly disappointed in a woman who has led a dedicated, Christian life. There was a grave element of weakness in that case so far as the jury is concerned, and I sympathize with the plaintiff, it's regrettable that they didn't get better results.

I don't believe that the situation calls for the rather drastic remedy of submitting it again to another jury and which, in all probability, I think, it would come out to about the same answer.

The motion for a new trial will be denied. [696]

* * * * *

[Endorsed]: Filed July 16, 1958.

[Endorsed]: No. 16116. United States Court of Appeals for the Ninth Circuit. Rose Wong and Kent Wong, Appellants, vs. Walter Swier and Laura A. Swier, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed: July 23, 1958.

Docketed: July 28, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 16116

ROSE WONG and KENT WONG, her husband,
Appellants,

vs.

WALTER SWIER and LAURA A. SWIER,
Appellees.

STATEMENT OF POINTS

Come now the appellants by their attorneys and make the following statement of points relied upon, to-wit:

1. All the evidence is insufficient in law to form a basis for a verdict in favor of the defendants.
2. The verdict is not sustained by sufficient evidence.
3. The Court erred in denying plaintiffs' Motion for a directed verdict in their favor at the close of all the evidence.
4. The evidence shows that the proximate cause of plaintiff Rose Wong's injuries was the defective ladder.
5. The evidence shows that the ladder was in the possession of the defendants Swier at all times and that said ladder had been tampered with.
6. That the Court erred in instructing the jury

relative to contributory negligence, relative to an unavoidable accident and relative to assumption of risk for the reason that said doctrines had no application in the case.

7. That the court erred in refusing plaintiff's requested Instruction No. 19.

8. That the Court erred in refusing plaintiffs' requested Instruction No. 20.

9. That the Court erred in refusing plaintiffs' requested Instruction No. 21.

10. Under the pre-trial order and all of the evidence in the case the verdict should be in favor of the plaintiffs.

11. That the jury misunderstood the measure of damages as shown by the question attached to the verdict and believed that they had to give \$100,000.00 or nothing.

12. That the Trial Court erred in denying plaintiffs' Motion to set aside Verdict and Judgment or in the alternative for a New Trial.

/s/ THOMAS K. HUDSON,

/s/ ALICE LOVELAND,

Attorneys for Appellants.

Certificate of Service by Mail Attached.

[Endorsed]: Filed August 12, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

The Clerk will please print the following portions of the record, to-wit:

Complaint.

Motion to Make More Definite and Certain (Filed on behalf of defendants Swier).

Plaintiffs' Motion to add Party Plaintiff.

Order Adding Party Plaintiff.

Answer of defendants Swier.

Request and Motion for Jury Trial (By defendants Swier).

Objections of Plaintiffs to Request and Motion for Jury Trial.

Pre-Trial Order.

Plaintiffs' Tendered Instructions Nos. 19, 20 and 21.

Verdict of Jury with question attached.

Judgment on Jury Verdict.

Plaintiffs Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs or, in the alternative for New Trial.

Affidavit of Vincent A. Noga.

Affidavit of Robert Masterman.

Order Denying Motion to Set Aside Verdict, etc.

Plaintiffs' Notice of Appeal.

Cost Bond on Appeal.

Designation of Record.

Statement of Points to be Relied Upon.

Motion to file Designation of Record without Transcript.

Certificate of Mailing.

Order allowing Designation to be filed without Transcript.

(Plaintiffs' Exhibit 1—Ladder.)

Plaintiffs' Exhibit 16.

The following portions of the Record of Proceedings at the Trial.

* * * * *

Motion for Directed Verdict.

Court's Instructions and Exceptions thereto.

Oral Ruling of the Court.

Dated this 10th day of August, A.D., 1958.

/s/ THOMAS K. HUDSON,

/s/ ALICE LOVELAND,

Attorneys for Appellants.

[Endorsed]: Filed August 12, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

AMENDED DESIGNATION BY APPELLEES
OF ADDITIONAL PORTIONS OF RECORD
TO BE PRINTED

The Clerk will please print the following additional portions of the record:

Answer of Defendants Swier with respect of Additional Party Plaintiff.

Application for Leave to Amend Answer of Defendants Swier to Complaint of Rose Wong.

Order of Court Granting Jury Trial.

Affidavit of Gordon Beck.

Affidavit of Homer B. Splawn.

Affidavit of Kenneth B. Elledge.

Affidavit of Ward M. Francis.

Affidavit of Robert Masterman (dated April 16, 1958).

Defendants' Exhibit No. 19.

Designation of Additional Portions of Record, Proceedings and Evidence to be Included in the Record on Appeal.

The following portions of the Record of Proceedings at the Trial:

Testimony of Walter Swier: Page 9, line 15 to line 23; Page 349, line 6 to line 20 and line 25.

Testimony of Cecil C. Clark: Page 397, line 17 to line 25.

Oral Decision of the Court With Respect of Appellants' Motion to Set Aside Verdict and Judgment.

Amended Designation by Appellees of Additional Portions of Record to be Printed.

Dated this 2nd day of September, 1958.

/s/ HOMER B. SPLAWN,
Attorney for Appellees.

[Endorsed]: Filed September 3, 1958. Paul P. O'Brien, Clerk.

No. 16116

United States
Court of Appeals
for the Ninth Circuit

ROSE WONG and KENT WONG,

Appellants,

vs.

WALTER SWIER and LAURA SWIER,

Appellees.

Opening Brief of Appellants

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division

FILED

DEC 31 1958

PAUL P. O'BRIEN, CLERK



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No. 16116

United States

Court of Appeals

for the Ninth Circuit

ROSE WONG and KENT WONG,

Appellants,

vs.

WALTER SWIER and LAURA SWIER,

Appellees.

Opening Brief of Appellants

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division

THOMAS K. HUDSON,
ALICE LOVELAND,
Attorneys for Appellants,
335 Petroleum Club Building,
Denver 2, Colorado,
MAin 3-2237.

I. PREFATORY STATEMENT

In the District Court Rose Wong, and her husband, Kent Wong, were plaintiffs and Walter Swier and his

wife, Laura Swier, were defendants. The parties will be referred to as they appeared in the trial court or by name.

Rose Wong is the real party plaintiff. Her husband, Kent Wong, was joined as a party plaintiff and in reality is only a nominal party. In this brief when the plaintiffs are referred to, we shall in all instances mean Rose Wong, unless otherwise specified.

The complaint as originally filed by plaintiffs named as defendants, in addition to the Swiers, Dr. James E. Zimmerman, Dr. Leland R. Lugar, and Yakima Valley Memorial Hospital Association. No service of process was obtained upon Dr. Leland R. Lugar. The trial court dismissed the action as to the defendants Dr. James E. Zimmerman and Yakima Valley Memorial Hospital Association and no appeal was or is taken from that order of dismissal. Therefore, the pleadings and portions of the record which pertain to the latter three named defendants are not material in this appeal and will be disregarded insofar as this opening brief is concerned.

II. JURISDICTION

Plaintiff Rose Wong, and her husband Kent Wong, the latter being joined as a party plaintiff subsequent to the filing of the complaint (R. 11), residents and citizens of the State of Idaho (R. 3) filed their complaint in the District Court for the Eastern District of Washington, Southern Division, against the defendants Walter Swier and Laura Swier, residents of the State of Washington (R. 3, 21) claiming damages in an amount in excess of three thousand dollars, exclusive of interest and costs (R. 6), said complaint having been filed on the 29th day of August, 1956 (R. 6).

By pre-trial order (R. 21) among the admitted facts were that the defendants were residents of the State of Washington and that plaintiffs were residents and citizens of the State of Idaho.

Jurisdiction of the United States District Court for the Eastern District of Washington, Southern Division, is invoked by:

28 U.S.C.A.

Sec. 1332

Diversity of citizenship, amount in controversy.

“(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs; and is between:

“(1) Citizens of different states; * * * ”

The jurisdiction of this court on appeal is invoked by the provisions of:

28 U.S.C.A.

Section 1291

“The courts of appeals shall have jurisdiction of appeals from all final decisions of district courts of the United States, * * * ”

III. STATEMENT OF THE PLEADINGS

Plaintiff Rose Wong, a citizen of the State of Idaho, filed on August 29, 1956 in the United States District Court for the Eastern District of Washington, Southern Division, her complaint in the nature of damages, against the defendants Walter and Laura Swier (R. 3-8). Her husband, Kent Wong, was by order of court (R. 11) added as a party plaintiff.

The complaint alleges jurisdictional facts (R. 3), and proceeds to allege that on October 17, 1955, Rose Wong was employed by the Swiers as an apple picker in the Swiers' orchards in Cowiche, Washington, and that on said date it became the duty of plaintiff in the course of her employment to go upon, and she did go upon, a ladder furnished to her by the Swiers (R. 3); that it

was the duty of the Swiers to furnish her a safe and secure ladder for the performance of her work and that the defendants, on the contrary, carelessly and negligently furnished to plaintiff Rose Wong an unsafe, defective and dangerous ladder, of which fact plaintiff was ignorant (R. 4).

The complaint further alleges that the defendants failed to warn plaintiff of the unsafe, defective and dangerous condition of the ladder and that solely by reason of the dangerous and defective condition thereof, the ladder tipped and fell while plaintiff was upon the same in the performance of her duties on October 17, 1955, that plaintiff was precipitated to the ground, and sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula and was otherwise injured (R. 4); that as a result of the negligence of the defendants plaintiff Rose Wong sustained permanent injuries, a shortening of the left leg; permanent and severe scarring; has been prevented from following any occupation and will continue to be so prevented; has been prevented from caring for her family; has suffered great pain of body and mind; has incurred expenses for medical attention and hospitalization and will continue to incur expenses therefor; has incurred expenses for orthopedic appliances and will continue to incur such expenses, all to her damage in the sum of \$100,000.00. The complaint prays judgment against defendants for the sum of \$100,000.00 (R. 5-6).

The Answer of defendants Swier admits that Rose Wong was an employee of theirs on October 17, 1955, as an apple picker in their orchard at Cowiche, and that as such employee she used a ladder furnished by the defendants (R. 7); admits that the plaintiff was entitled to be furnished a reasonably safe ladder. Defendants Swier further deny that the ladder furnished by them was defective or unsafe or dangerous, but admit that Rose Wong received an injury, alleging they have no information as to the nature or extent of such injury.

Affirmatively by their answer Swiers allege that the plaintiff Rose Wong's injury was proximately caused by her contributory negligence; and that she assumed the risk of whatever conditions existed in respect of the ladder and the use thereof (R. 9).

On June 10, 1957 (R. 13) Swiers filed their written motion requesting a jury trial (R. 12-13) and sought leave to amend their answer and to file an Answer with respect to Additional Party Plaintiff (R. 13, 15-20).

Plaintiff objected to the granting of the Motion for Jury Trial (R. 20) as not being timely and not being in accordance with the Federal Rules of Civil Procedure, to-wit: Rule 38(b).

The court entered an order striking the defendants' Answer with respect to the additional party plaintiff, and the motion to amend their Answer. While no formal order was entered with respect to granting a trial by jury, the case was tried to a jury.

Pre-trial conference was held on June 6, 1957, and a pre-trial order entered on February 13, 1958 (R. 31). The pre-trial Order contains the following Admitted Facts:

(R. 21) 1. That the defendants are residents of the State of Washington, and that plaintiffs are residents and citizens of the State of Idaho; and that this court has jurisdiction herein;

(R. 22) 2. That Rose Wong was on October 17, 1955, in the employ of Swiers, and that as such employee she used a ladder furnished by the Swiers, and that the Swiers were under a duty to furnish the plaintiff a safe ladder.

3. That plaintiff sustained injuries by reason of a fall from said ladder in the course of her employment.

The plaintiff, hereinafter referred to as the plaintiff, states in the pre-trial order that the ladder furnished to her by the Swire was an unsafe, defective and dangerous R. D. ladder, and that said plaintiff was negligent and that the defendants herein failed to warn the plaintiff of the unsafe, defective and dangerous condition of the ladder, that unsafe, defective and dangerous condition of the ladder was known to certain persons known by the defendant, that said defendant's condition included but was not limited to the following defects: That the metal parts and wire assembly at the top of the ladder was defective, that the center of the ladder was defective and that there was a sharp end and situations which he described as R. D. Plaintiff's further contentions as contained in the pre-trial order are that plaintiff's fall was proximately caused by the defective condition of the ladder and that by reason of the fall plaintiff sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula and was otherwise injured that she has sustained as a proximate result of the negligence of defendant's temporary and permanent injuries and disabilities consisting of a shortening of the left leg, permanent and severe weakness, permanent contracture and rotational joint R. D. She has been and will continue to be prevented from following any occupation and from caring for her family, and has suffered and will continue to suffer great pain of body and mind.

Plaintiff's have incurred expenses for medical attention in the sum of \$12,500; expenses for hospitalization \$1,642.57; expenses for drugs of \$500.00; and for orthopedic appliances in the sum of \$2,500; and that the damages proximately resulting from defendant's negligence are special damages of \$12,500.00 and general damages of \$12,500.00. Plaintiff further contend that they will continue to incur expenses for medical attention, hospitalization, drugs and orthopedic appliances (R. D.).

The contentions of defendants Swier as contained in the pre-trial order are: That plaintiff Rose Wong assumed whatever risks were entailed in the condition of the ladder or the use made of it or expected of it (R. 25); that plaintiff was negligent in that she endeavored to use the ladder while she herself got in an unbalanced position endeavoring to pick (R. 25) fruit at an angle and distance so as to cause her and the ladder to become unbalanced and to fall; or that she did not set it properly; or in the use of the picking bag she positioned it so that it obstructed a balanced use of the ladder and put her into a unbalanced position with respect to the ladder; or she was not attentive to the fact that she was in an unbalanced position, or was not paying sufficient attention to the fact that in the use of the ladder she could not extend her body to the degree and angle which she must have done, or she permitted herself to slip on the rung of the ladder on which she was standing so that she did not have a firm footing (R. 26).

Swiers further contend that if there were any defective condition or conditions in the ladder amounting to negligence as claimed by plaintiff, that plaintiff Kent Wong became responsible therefor for the reason that when the ladders were furnished to the Wong family, it was requested verbally that he report any defect in their ladders, to which he assented verbally as a part of his employment; and that if such defect arose, then he breached his contract of employment in failing to report any defect (R. 26).

Issues of fact as delineated by the pre-trial order:

1. Was the ladder furnished by defendants Swier so defective and unsafe in the respects set out in the pre-trial order that it was not a safe ladder for the use for which it was intended and furnished, according to the standard of the law of the State of Washington (R. 28-29)?

2. Did plaintiff Rose Wong assume the risk, if any, of said conditions, if any, and the risk of using the ladder in the condition in which it actually was (R. 29)?

3. Was the plaintiff Rose Wong negligent in the use of the ladder in the respects previously alleged in the order (R. 29)?

4. What damage, if any, was occasioned Rose Wong as a proximate result of the negligence, if any, of the defendants, Walter Swier and Laura Swier (R. 29)?

The case was tried to a jury, which jury returned a verdict in favor of the defendants (R. 34) and judgment entered thereon in favor of defendants (R. 35), on March 28, 1958.

Plaintiffs filed on April 4, 1958, their Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs, or in the Alternative for a New Trial (R. 36-40), which Motion was denied by the Court (R. 46-47) on May 28, 1958.

It is from the judgment in favor of defendants that plaintiffs bring this appeal.

IV. CONCISE STATEMENT OF CASE

The plaintiff Rose Wong, a woman of 45 years of age (R. 84), married and the mother of five children ranging in age from 7 to 18 years (R. 85), was on October 17, 1955 in the employ of the defendants, Walter Swier and Laura Swier, engaged by them as an apple picker in their orchard near Cowiche, Washington. By occupation she was a missionary and house wife (R. 84) and an ordained minister (R. 130) having been engaged in missionary work for 21 years (R. 84, 113), a number of years being in the foreign field. In the spring of 1955 the plaintiffs were preparing to return to the foreign field of missionary work, under a contract which pro-

vided that they were to receive \$350.00 per month (R. 134), plus compensation to some person for the care of the three eldest children (R. 112, 134), who were to remain in the United States. Plaintiff Rose Wong had been acquainted with Walter and Laura Swier for a number of years (R. 55, 307) and this acquaintanceship had arisen and continued by virtue of the religious work in which plaintiff engaged (R. 55, 307). In about June, 1955, the three eldest children of plaintiffs were living with the defendants Swier and under the provisions of the contract the Swiers were to be paid therefor (R. 112, 134). For some reason the contract of the plaintiffs to return to the foreign missionary field was not consummated by the church group with whom they had entered into such contract (R. 133-134) and the plaintiffs went to the Yakima Valley while waiting. They were living in the tenant house on the Swier ranch (R. 129) near Cowiche, Washington, in the summer of 1955; plaintiff Kent Wong doing some work around the fruit farm (R. 111, 135-136) for which he was paid by the Swiers (R. 111, 136).

The apple harvesting season commenced October 10, 1955, on the Swier farm (R. 116); a school vacation was had for the purpose of permitting school children to work in the harvest, and the plaintiffs' three eldest children, together with both of the plaintiffs became employees in such harvest (R. 255).

It is admitted by plaintiffs and also by defendants Swier (R. 21-22) that plaintiff Rose Wong was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and that as such employee she used a ladder furnished by them, and that the defendants Swier were under a duty to furnish her with a safe ladder. It is further admitted that plaintiff Rose Wong sustained injuries by reason of a fall from said ladder in the course of her employment; that Dr. James B. Zimmerman was contacted with reference to her treat-

ment and care; that she was taken to and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington, and that while there as a patient in said hospital gas gangrene developed.

During the early fall of 1955 plaintiff picked pears for defendant Swier, working about one week (R. 135) during which she used a ladder, handling and setting the ladder herself (R. 114). She had had no experience prior to that time in picking fruit (R. 85). On the morning of October 17, 1955, she was picking Delicious apples using the ladder furnished by the Swiers, and which is plaintiffs' Exhibit 1. She had climbed the ladder after carefully setting and testing it on both sides to see that it was well-balanced, had ascended to the second rung from the top (R. 103), and had picked the apples within reach. She turned her body slightly to the right in order that the bag which was then about full of apples would not hit on the ladder, and as plaintiff turned, there was a quick give of the ladder, and it went out from under her feet. She made a grab for a limb of the tree, but could not hang on, and fell to the ground (R. 123-125) the ladder also falling to the ground (R. 125).

In the fall, plaintiff's left leg struck some object, what is not known (R. 138-139), and she sustained a left ankle compound comminuted fracture of the distal end of the shaft of the tibia and fibula (R. 139, 63). The plaintiff momentarily fainted (R. 140) and upon regaining consciousness saw the bones protruding through her hose (R. 139) and directed the making of a temporary splint (R. 141-142).

Defendant Laura Swier then telephoned the office of Dr. James E. Zimmerman (R. 142, 22), and Dr. Zimmerman sent his office nurse to the orchard scene (R. 143). The nurse administered no temporary aid, having demerol with her and plaintiff advising the nurse that she was allergic to such drug (R. 143). An ambulance

arrived some time later (R. 143) and plaintiff was taken and admitted to the Yakima Valley Memorial Hospital in Yakima, Washington (R. 144, 22) at about one o'clock in the afternoon of the same day, October 17, 1955.

The only evidence offered relative to the accident and how it occurred is the testimony of the plaintiff Rose Wong.

Dr. James E. Zimmerman, physician and surgeon, residing and with offices in Cowiche, Washington (R. 61-62) was called and saw the plaintiff Rose Wong in surgery at the Yakima Valley Memorial Hospital (R. 63). She had suffered a comminuted and compound fracture (that being one that is broken in many places and one that protrudes through the skin) of the lower third of both bones of her left leg, which would be the tibia and fibula; had a laceration, an open wound, in the medial part of the inner part of her left leg where the fragments had pierced the skin and muscle in that area (R. 63). X-rays were taken (R. 64) and show the obvious displacement and alteration of the bones (R. 65). The X-rays taken after reduction, called post-reduction films (R. 68) show the metal plate and three metal screws (R. 68).

Plaintiff remained in the Yakima hospital from the date of admission on October 17, 1955, until December 13, 1955 (R. 22, 88, 100). While confined to the hospital during that period of time gas gangrene set in in the injured left leg (R. 22); she had not been given gas gangrene anti-toxin when the reduction was made on October 17, 1955 (R. 88). One week after her admission to the hospital, to-wit on October 24, 1955, she was again taken to surgery and the cast removed (R. 96) and the gangrene discovered (R. 96-97). Her leg at that time was split open and tubes inserted for drainage, and irrigation of the wound carried out, the plaintiff having been placed in isolation at the hospital (R. 98) and given gas gangrene anti-toxin on October 24th and subsequently thereto (R. 98-99).

During the week from October 17, 1955, the leg became swollen until the cast was very painful and tight (R. 90) and in an attempt to alleviate the pain the cast was split (R. 90). The leg, however, continued to swell (R. 90). Toward the end of that first week the upper part of her leg from the knee to the hip was swollen, blotchy in color with reddish-purple blotches (R. 90). Large green blow-flies continually gathered on the cast (R. 90); her body became covered with an oily and foul smelling perspiration (R. 91), and her back and the back of her neck became very painful (R. 91).

On October 24, 1955, she was prepared for surgery (R. 96) and was taken to the operating room where the doctor pried off the cast with his hands (R. 96) causing such pain that she cried out "this is murder." The doctor squeezed the leg with his hands and blood and pus exploded (R. 96). Plaintiff was then given an anesthetic and put to sleep (R. 97).

After this trip to surgery on October 24, 1955, she was given anti-toxin for gas gangrene (R. 97), and placed in isolation (R. 98).

On November 15, 1955, further surgery was performed on the leg (R. 99), at which time the doctors cut out the rest of the rotting flesh and put a cast from the upper calf and knee of the leg, to the tip of the plaintiff's toes, cutting a window in the cast for drainage and dressing of the wound (R. 100). Plaintiff was discharged from the Yakima Valley Memorial Hospital on December 13, 1955 (R. 88, 100) to her home. She continued to have the injury treated by Dr. Zimmerman, calling at his office at intervals of from every day or two to every four weeks (R. 186-187). In December of 1956, she entered St. Elizabeth's Hospital (R. 100) and further surgery was performed on the leg by Dr. Bocek (R. 100), at which time the old wounds which had continued to drain, were scraped and a long drain put in. The ankle on the left leg which had broken open and was running

green pus, was opened and scraped, a drain put in, and about three stitches taken below the drain (R. 101).

Further surgery was performed in May of 1957, again at St. Elizabeth's Hospital in Yakima, and this surgery also by Dr. Bocek (R. 102). At that time a hole approximately an inch and a half in diameter was scraped in the original wound on the ankle and gauze placed in there as a drain to keep the wound open (R. 102). Dr. Bocek continued to treat the plaintiff and the wound continued to drain until February of 1958 (R. 102) at which time it healed over.

At the time of trial in March 1958, the ankle remains very painful and it is impossible for the plaintiff to walk normally; she uses a cane; the ankle is stiff so that she can neither go up or down stairs except one step at a time and with the support of a railing; the leg is shortened; she is unable to do normal housework or care for her family; by exerting herself the plaintiff can walk a distance of a block (R. 103).

Dr. Max Bocek testified that the plaintiff had two scars, on the ankle, one lateral and one medial; that due to the joint injury because of the fracture, it has resulted in a stiff ankle on the left side, in a slightly toe-down position, and because of the injury to the joint, she shows signs of developing what is called a traumatic arthritis, a breakdown in the joint (R. 158); that previously there had been the condition of osteomyelitis, but at time of trial there were no clinical signs of it (R. 158); that there is a chance of the same recurring (R. 158-159); that in a joint as badly injured as in the instant case, a painful joint remains (R. 162) and will probably need a fusion (R. 162-163) but before surgery of that nature is undertaken a period of 18 months to 2 years should elapse with the wound healed (R. 163) and that the chances of a successful fusion are about sixty per cent (R. 172); and that the chances of a recur-

rence of osteomyelitis, which is a bone infection (R. 171) are about fifty-fifty (R. 170).

The defendants offered no medical testimony with reference to the injury.

Plaintiffs had been earning the sum of \$350.00 per month prior to the accident (R. 108, 110, 131) and are now unable to pursue the missionary, religious and church work (R. 132). Rose Wong on October 17, 1955 had attained the age of 45 years and a life expectancy of 25 years and 77 days (R. 370). The plaintiffs had further incurred expenses for hospital bills to the Yakima Valley Memorial Hospital in the sum of \$1,492.57 (R. 30) and to Dr. Zimmerman, Dr. Max Bocek, Dr. Brundange and Dr. Noall in the amount of \$1135.00; drugs of \$360.00 and orthopedic appliances of built up shoes and cane, brace of \$55.00 (R. 25, 105-107). No evidence was offered by the defendants with reference to the special damages sustained by plaintiff.

Standing uncontradicted, and therefore admitted, by the defendants are the items of damages sustained by plaintiff resulting from her fall.

The ladder, from which plaintiff fell, was taken into custody by the defendant Walter Swier following the accident and remained in his custody and under his control at all times until the trial (R. 30, 219, 272-273, 348-351, 320, 321). At the pre-trial conference counsel for defendants stated that he had possession of the ladder, that it was available for inspection (R. 30).

Chauncey W. McDonald, a witness for the plaintiffs, employed as a safety inspector for the Department of Labor and Industries of the State of Washington for nine years (R. 69) and prior to that time engaged in construction work since 1922 (R. 70) in connection with which approximately one-fifth to one-sixth of the time involved the use of ladders (R. 70-71) testified that he had examined the ladder, plaintiffs' Exhibit 1, and that

it was not a reasonably safe ladder (R. 73). He demonstrated with the ladder (R. 73) showing that while on the lower rungs of the ladder it was safe, but as one ascended the ladder, the weight shifted to a different portion of the ladder; that the ladder was cracked up along the side-rail where it had been in a twist before and it would not be safe. Further Mr. McDonald testified that due to the looseness in the top yoke (R. 74) the ladder would go into a twist; that the holes where the bolts connect the yoke to the ladder were worn and permitted play (R. 74) and that the ladder was unsafe for use in an orchard for purposes of apple picking because of the looseness (R. 75).

On the contrary, witness on behalf of the defendants Swier testified that the ladder was safe. Mr. Cecil C. Clark, a fruit grower in the Yakima Valley (R. 198) who had used, borrowed and observed many ladders (R. 204) testified that the ladder was loose at the top (R. 211) and that the tongue had some play in it (R. 206) but nevertheless was a safe ladder (R. 206).

However, upon cross-examination, and the witness looking at the ladder, the following testimony was given (R. 222):

“Q. Is the ladder, Mr. Clark, in its now condition, the same as you have seen it previously?”

“A. No, I think those bolts were a little looser when I looked it over at the ladder company.

“Q. Now, you didn’t say anything about that this morning, did you?”

“A. Well, I was not asked, and I was stopped when I started to make comments, so naturally I wouldn’t.

“Q. In other words, you didn’t inspect it this morning before your testimony?”

“A. Yes, I did. I inspected it before court convened.

“Q. And you were cognizant that they were looser when you saw it previously?

“A. Yes.

“Q. Now, would a three-sixteenths looseness between the side of the yoke and the metallic side of the ladder, would that give more play in the top part of the ladder?

“A. Yes, it would give a little more play.

“Q. And if the hole in the yoke where this small bolt comes through, if the hole in the yoke is larger than the hole in the side piece, would that give more play?

“A. Yes, it's bound to give it a little more play.”

He further testified that in the manufacture of ladders the hole in the yoke was the same size as the hole in the side piece of the ladder (R. 223).

Witness C. A. Brazil (for defendants) testified that he had examined the ladder and that there was some looseness in the top assembly (R. 234,); and upon cross-examination testified that customarily in the manufacture of ladders the holes in the yoke and the side plate, where they matched up, were of the same size and that if a small bolt were used in a large hole, it would increase the play (R. 239) and specifically that if a 3/16th bolt were used in a hole in the yoke assembly which was 3/16th inch larger than the bolt, it would give a lot of play (R. 239). Witness Brazil did not testify that the ladder was safe (R. 233-242).

Ben Hovde, witness for the defendants, a fruit rancher, who had owned possibly 20 ladders and borrowed others and had quite a bit of experience in handling ladders (R. 243) testified he had examined the ladder in the case

at Dependable Ladder Company in their warehouse (R. 244), that he observed a play or looseness in the top assembly which he stated was the regular play a ladder would have in average use (R. 245). On cross-examination he testified that by use and wear the hole in the side plate became enlarged (R. 248), but that ladders were not manufactured that way. Witness Ben Hovde did not testify the ladder was safe (R. 243-252).

Herbert Rossow, owner and operator of Dependable Ladder Company since January of 1958 (R. 270) and prior to that time shop foreman of that company (R. 270), which company engages in the manufacture of ladders (R. 271) testified that the ladder which was in evidence as plaintiffs' exhibit 1, had been in their place of business for possibly more than a year (R. 273); that he had checked over the ladder when it was brought in (R. 274) and that more than a year prior Mr. Hudson, Miss Loveland, Mr. Mullins (counsel for plaintiffs) and Mr. Splawn (counsel for defendants) inspected the ladder at the place of business. That at the time of such inspection the play in the tongue of the ladder was measured by Mr. Hudson (R. 274-275) with a ruler which he had borrowed from the witness (R. 275), that the play in the tongue of the ladder was at least four inches (R. 276).

Upon cross-examination Mr. Rossow testified that he recalled Mr. Hudson's measuring the top assembly of the ladder (R. 280), i.e. the gap between the side of the hinge and the side of the plate on the leg of the ladder, measuring the amount of play there was in the bolt compared to the hole (R. 280). He further recalled that Mr. Hudson had commented on the size of the bolt (R. 282) but did not remember the measurable distance (R. 282), but only that it could be measured and was measured by Mr. Hudson. He testified that the ladder in the court room, plaintiff's Exhibit 1, the gap could not be measured at all—it was too small (R. 282).

Witness Rossow did not testify the ladder was safe (R. 270-282).

Louis C. Moritz, fruit farmer in the Yakima Valley for many years (R. 283) having used a lot of ladders both himself and his employees (R. 285) testified on behalf of defendants to the effect that he had examined the ladder in question at the Dependable Ladder Company (R. 286), noticed the steps were tight, that the pole had a little sway back and forth (R. 287), and that he "assumed the ladder would be safe enough for me to put a picker on (R. 288); On cross-examination, he testified that the ladder was loose right at the top (R. 292) and that if there was 3/16th inch play on each side of the hinge, and the same amount in the bolt, that it would make a difference in the stability of the ladder so it would twist more (R. 292).

Defendant Walter Swier testified that he had admitted to the plaintiffs subsequent to the accident of Mrs. Wong, that there was play and looseness in the top of the ladder (p. 265, 266). With reference to the ladder, his statement and testimony were that (R. 270): "It's average or better than average"; and further that he had measured the play in the tongue of the ladder and found it to be four inches one way and three inches the other (R. 292-293).

Defendant Laura Swier testified that she had told plaintiff after the accident that they had found "some looseness in that ladder" (R. 309, 310).

Testimony of the following witnesses on behalf of plaintiff in rebuttal was offered to the effect that the ladder had been tampered with:

The ladder was inspected at the place of business of Dependable Ladder Company on Friday preceding the commencement of the trial on Monday with the following persons present: Mr. Hudson, Miss Loveland, Mr. Mullins (counsel for plaintiffs) Mr. Bounds associated in the practice of law with Mr. Homer Splawn (counsel for de-

fendants), (R. 313, 322, 328, 349). Between the date of inspection and the time the ladder was admitted into evidence during the trial, that it had been tampered with there seems to be no contradictory evidence. Two of defendants' witnesses stated it was not in the same condition when seen during the trial as it was when examined by them previous to trial (R. 280-282, 222). Mr. Hudson and Miss Loveland each testified to the insertion of additional washers in the top assembly of the ladder and the tightening of the bolts (R. 321-327, 312-321), Mr. Mullins testified (p. 329-330) that the thing he noticed which he felt was not the same as it was at the time of inspection was the lateral play of the yoke between the two side plates of the ladder, and the difference between the metal on the hinge at the top and the metal side plates at the top of the ladder; and that there is no play there now.

The ladder was at all times from the date of the accident on October 17, 1955, to and including the date of trial on March 24, 1958, in the possession and under the control of the defendants (R. 30, 219, 272-273, 348-351, 263, 303, 320, 321).

Plaintiffs at the conclusion of all the evidence moved for a directed verdict (R. 352) upon the grounds of a failure of any evidence upon which reasonable people could differ or upon which any other inferences could be drawn other than inferences in favor of the plaintiff. And, upon the further ground, that as a matter of law the defendants had failed to offer any evidence to rebut the presumption which arose in favor of plaintiffs by reason of the tampered-with evidence, i.e., the ladder which was within the possession and control of defendants at all times subsequent to the accident.

The Court denied the motion (R. 357).

The Court's instructions to the jury included instructions on "contributory negligence," "assumption of risk,"

(R. 368) and “unavoidable accident” (R. 369), to which exception was made by the plaintiffs (R. 375-376).

Plaintiffs requested the giving of their tendered Instruction Number 20 (R. 33) with reference to the presumption raised when evidence has been fabricated or altered; and Instruction No. 21 (R. 33-34) with reference to the conduct of a party who destroys, alters or fabricates evidence being an admission.

The Court refused these tendered instructions, and plaintiffs entered their exception (R. 376).

The jury returned its verdict (R. 34) in favor of the defendants. With such verdict, the jury returned the following question: “If we find in favor of the Wongs—were your instructions to the effect—that we were to consider her remaining 25 years and 77 days—for a method of compensation—Yes or No.” This was signed by Kenneth B. Elledge, Foreman” (R. 34).

Judgment was entered on the jury verdict (R. 35) in favor of the defendants.

Plaintiffs filed their Motion to Set Aside Verdict and Judgment and to Enter Judgment for Plaintiffs, or in the Alternative for a New Trial (R. 36-38), to which Motion are attached the affidavits of two of the jurors, to-wit: Vincent A. Noga (R. 38-39) and Robert Masterman (R. 39-40). The grounds of the Motion were briefly that the court had erred in denying plaintiffs’ Motion for a directed verdict at the conclusion of all the evidence; that the ladder which was the principal exhibit in the case was in the possession and control of the defendants Swiers at all times and that said ladder had been tampered with; that the court had erred in the giving of instructions and the refusal to give plaintiffs’ tendered instructions Nos. 19, 20 and 21. Further, that the jury misunderstood the measure of damages as is shown by the question returned together with the verdict (R. 36-37).

The affidavits of the two jurors, attached to said motion, are to the effect that the jury found in their deliberations that the ladder had been tampered with, and that the substance on the bolts connecting the hinge assembly with the top of the ladder was not paint, but was putty, and ascertained this fact both by smelling said substance and by tasting it (R. 38-40).

Submitted upon the hearing of plaintiffs' Motion to Set Aside Verdict or in the Alternative for a New Trial, by counsel for defendants was the affidavit of counsel and the affidavit of two other jurors to the effect that the members of the jury had taken no formal ballot with reference to the tampering (R. 40-44). Submitted also by defendants was a further affidavit of juror Masterman (R. 45) to the effect that "any tampering with the ladder had no bearing on the decision of the jury."

The Court (R. 46-47) included in his statement at the time of entering the order denying plaintiffs' motion to set aside the following language (R. 379): "So that I felt that there was a factual conflict and a factual question to be decided by the jury. It's true that it appeared to me as being a rather one-sided one. If I had been the trier of the facts I would have found that there had been a change in the ladder because I think the evidence was to me very convincing and overwhelmingly so in favor of there having been some tightening of those bolts. How or why I could only conjecture, of course, and I think perhaps it would be fair under these authorities to ask that an inference be drawn against the defendants because of that situation of alteration of the ladder * * *."

Plaintiffs then proceeded to perfect an appeal to this court (R. 47-51).

V. SPECIFICATION OF ERRORS RELIED UPON

1. The trial court erred in denying plaintiffs' Motion for a directed verdict in their favor at the close of all evidence.

2. The trial court erred in refusing plaintiffs' requested Instruction No. 20, as follows (R. 33):

“You are instructed that a party's falsehood or other fraud in the preparation and presentation of his case, his fabrication, alteration and all similar conduct, is an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the case's lack of truth and merit. That inference does not apply to any one fact in the case, but operates strongly against the whole mass of facts constituting his case.

“You are therefore further instructed that the changes or alterations in the ladder which occurred subsequent to the time of the accident on October 17, 1955, cast suspicion on the whole of the defense of Swiers and create a strong presumption that the ladder on the date of the accident was defective.”

3. The trial court erred in refusing to give plaintiffs' requested instruction No. 21 (p. 33-34).

“You are instructed that all efforts by a party to a suit, directly or indirectly, to destroy, alter, fabricate or suppress evidence is in the nature of an admission by such party that he has no sufficient case unless aided by suppressing evidence, or by the alteration or fabrication of more evidence.”

4(a). The trial court erred in giving to the jury the following instruction on contributory negligence, (p. 364-365):

“‘Contributory negligence’ is negligence or want of care, as herein defined, on the part of a person suffering injury or damage which proximately contributes to cause the injury and damage complained of. Contributory negligence bars recovery on the part of a person suffering injury or damage, even though the opposing party is guilty of negligence.”

4(b). The trial court erred in giving that portion of the instruction appearing on page 365 of the record, the last clause in the second full paragraph on said page, reading as follows, to-wit :

“* * * unless you find that recovery by plaintiff is barred by contributory negligence or assumption of risk.”

And that portion of the instructions as follows (p. 368) :

“Now, a plaintiff who is contributorily negligent, as such term has been defined to you, cannot recover from the defendants, irrespective of negligence, if any, on the part of the other party, the defendants.”

5. The trial court erred in instructing the jury as follows, to-wit (R. 369) :

“One who, as servant or employee, enters into the service of another, assumes by his contract of employment the risk of all dangers ordinarily incident to the work upon which he engages, and also the extraordinary risks of employment if they are open and apparent, although due directly to the master’s negligence.

“If you find by a fair preponderance of the evidence and under the Court’s instructions that the plaintiff assumed the risk of what befell her, then she cannot recover from the defendants Swier, irrespective of negligence, if any, on their part.”

6. The trial court erred in instructing the jury as follows, to-wit (R. 369) :

“Now, every accident does not necessarily establish a cause of action warranting recovery by the injured party. Accidents may occur for which no one is to blame. An unavoidable accident is an unintended occurrence which could not have been prevented by the exercise of reasonable care. There is no liability for unavoidable accidents.

“If this accident should be considered by you to have been unavoidable, then you should return a verdict for the defendants.”

7. That the jury misunderstood the measure of damages as shown by the question attached to the verdict and believed that they had to give \$100,000.00 or nothing.

VI. SUMMARY OF ARGUMENT

The major portion of the material facts in this case are admitted, thus requiring no proof; i.e., it was admitted that plaintiff Rose Wong was on October 17, 1955, in the employ of the defendants Walter Swier and Laura Swier, and that as such employee she used a ladder furnished by them, and that the defendants Swier were under a duty to furnish a safe ladder. It is further admitted that plaintiff sustained injuries by reason of a fall from said ladder in the course of her employment. Plaintiffs were required, therefore, to prove only two things: (1) that the ladder furnished by the Swiers was defective; and (2) the extent of the injuries and amount of damages sustained by Rose Wong as a result of the fall.

The evidence is uncontradicted insofar as the injuries and damages are concerned. Defendants offered no evidence with reference thereto, thus eliminating that point from our summary here.

There remains, therefore, only the question of the ladder—was it defective? Or, was it a safe ladder?

The ladder in question, from the date of the accident on October 17, 1955, was at all times in the possession, custody and control of the defendants and their counsel. There is no dispute nor contention to the contrary. The ladder was placed in storage at the Dependable Ladder Company by the defendants and their counsel, and was there inspected by witnesses for both parties. At the time the ladder was inspected by plaintiff's witnesses, it was

in the presence of defendants' counsel. The ladder was brought to the court room for the trial of this case by defendants' counsel.

The evidence is that the ladder, as it stood in the court-room, had been tampered with; it was not in the same condition it had been previously when inspected and when the accident occurred.

Defendants offered no testimony to explain such alteration. Upon their failure so to do, plaintiffs contend that a presumption arose that defendants had no defense to plaintiffs' claim except by the alteration of the ladder. Having failed to explain away the tampering with evidence, the presumption remained, and as a matter of law plaintiffs were entitled to a preemptory instruction directing a verdict in their favor.

The court, having over-ruled plaintiffs motion for such directed verdict, most certainly should have instructed the jury with reference to the inference and presumption which arise in the face of evidence which has been tampered with. Such instruction was requested by plaintiffs and refused by the court. That this failure to instruct was error is borne out by the affidavit of a juror, who under oath states that the tampering was not even considered by them. Plaintiffs contend that the failure to instruct the jury with reference to evidence which has been tampered with constitutes reversible error.

There was no eye witness to the accident. No person except the plaintiff Rose Wong testified with reference to the happening thereof and the reason for the ladder falling. Defendants offered no evidence to establish the affirmative defenses contended for by them, i.e., contributory negligence, assumption of risk and unavoidable accident. However, the court instructed the jury with reference to each of said affirmative defenses. Plaintiffs contend that the giving of said instructions without evidence upon which to base the same was error.

That the jury misunderstood the instructions of the court as applicable to the facts they heard is easily ascertained from the question asked by them, and returned with the verdict. The verdict and the question are wholly inconsistent.

The verdict is as follows (R. 34):

“We, The Jury in the above entitled cause find for the defendants.”

Signed: Kenneth B. Elledge,
Foreman”

Yet the question attached is as follows:

“If we find in favor of the Wongs—were your instructions to the effect—that we were to consider her remaining 25 years and 77 days—for a method of compensation—Yes or No.

Signed: Kenneth B. Elledge,
Foreman”

The verdict and the question returned with it are irreconcilable.

VII. ARGUMENT

1. The trial court erred in denying plaintiffs' Motion for a directed verdict in their favor at the close of all evidence.

2. The trial court erred in refusing plaintiffs' requested Instruction No. 20, as follows (p. 33):

“You are instructed that a party's falsehood or other fraud in the preparation and presentation of his case, his fabrication, alteration and all similar conduct, is an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the case's lack of truth and merit. That inference does

not apply to any one fact in the case but operates strongly against the whole mass of facts constituting his case.

“You are therefore further instructed that the changes or alterations in the ladder which occurred subsequent to the time of the accident on October 17, 1955, cast suspicion on the whole of the defense of the Swiers and create a strong presumption that the ladder on the date of the accident was defective.”

3. The trial court erred in refusing to give plaintiffs' requested instruction No. 21 (p. 33-34):

“You are instructed that all efforts by a party to a suit, directly or indirectly, to destroy, alter, fabricate or suppress evidence is in the nature of an admission by such party that he has no sufficient case unless aided by suppressing evidence, or by the alteration or fabrication of more evidence.

The facts and law applicable to specifications of error numbered 1, 2 and 3 are the same and therefore will be presented as one.

It behooves us to keep in mind throughout this argument that a large portion of the material facts are admitted (R. 21-22) i.e., the relationship of employer and employee, the duty of the Swiers to furnish plaintiff Rose Wong with a safe ladder; that in the course of her employment while using the ladder, plaintiff sustained a fall resulting in injury to her. Only two material facts remain to be established by plaintiffs, to-wit: that the ladder was defective; and (2) the extent of injury and amount of damages resulting from the fall.

It is with the first of these that we are concerned at the moment.

Plaintiff's contention is that the ladder was defective in that the hinge or yoke assembly at the top of the ladder was loose, permitting excessive play in the ladder; that

the hole in the metal plate and the side of the ladder were larger than the bolt used to hold them, thereby permitting the additional play in the ladder and the twisting of the ladder in its use, and that it was this condition of the ladder which caused plaintiff's fall and injury (R. 22-23).

Plaintiff's testimony is that the ladder was loose at the top and that she was advised subsequent to the date of the accident of such condition of the ladder by both Mr. and Mrs. Swier (R. 108, 109, 110, 265, 266, 309, 310) these defendants each admitting looseness in the ladder.

That loose condition of the ladder and the play in the assembly was noted by all witnesses examining the ladder after the accident but prior to the date of trial.

The ladder from which plaintiff Rose Wong fell was removed from the orchard where the accident occurred by the defendant Swier and placed in a shed on his place (R. 263, . . .). It remained there until it was removed to the warehouse of Dependable Ladder Company at the request of defendants' attorney. It was brought from that place to the court room on the day of trial by counsel for the defendants (R. 348-351). There is no dispute nor contrary contention but that the ladder was at all times from the date of the accident to the trial in the custody and control of the defendants.

When the ladder was examined in the court room during the trial, the testimony of plaintiffs (R. 343-344) and plaintiffs' witnesses was to the effect that the ladder had been altered (R. 329-330, 321-325, 313-315) that washers had been inserted at the top of the ladder between the assembly and the plate, which tightened up the top assembly. Of paramount significance is that defendants' own witnesses also testified that the ladder had been altered and was not in the same condition it was when previously examined by them, such witnesses being Mr. Cecil Clark (R. 222) and Mr. Herbert Rossow (R. 282).

Mr. Clark testified unequivocally that the ladder was not in the same condition (R. 222) using the following language: "The bolts were a little looser when I looked it over at the ladder company." Further testifying that he was cognizant at the time he gave his testimony on direct examination that the bolts were looser when he saw the ladder previously (R. 222).

The trial court itself was convinced that the ladder had been tampered with, as evidenced by its comments (out of the jury's presence) (R. 230) during the trial, and the statements upon denying plaintiffs' motion to set aside verdict and judgment or in the alternative for new trial. We find the court expressing the following (R. 230-231): "It seems to me now, in the present state of the record, that without any question of dispute, it's established that this ladder has been tampered with, that it is not in the condition that it was in the warehouse, * * * and I think at least until you raise a fact or issue to show that this ladder has not been tampered with, you should not demonstrate it. Of course, the thought immediately occurs to me if it is just as good loose, why was it tightened up before it was brought in here? Your own witness says that it was * * * (R. 231). Well, he testifies that it was looser. I don't like the looks of this frankly. I think there has been tampering with evidence before it was brought in."

And, at R. 379: "* * * If I had been the trier of the facts I would have found that there had been a change in the ladder because I think the evidence was to me very convincing and overwhelmingly so in favor of there having been some tightening of those bolts. How or why I could only conjecture, of course, and I think perhaps it would be fair under these authorities to ask that an inference be drawn against the defendants because of that situation of alteration of the ladder, * * *"

After defendants' witness Clark testified to the altered condition of the ladder, their counsel made an offer which

we feel should be brought to the attention of this court, for it strengthens the admission of alteration. At page 231 of the record, we find the following statement by defense counsel: "Well, then, I offer to have him put it in the condition in which it was."

Another witness for the defense, Mr. Herbert Rossow, also testified that the ladder was not in the same condition as it was while stored at his place of business (R. 282).

That the ladder, at all times in the custody and control of defendants, had been tampered with and its condition altered and changed there can be no doubt, and such tampering, and such alteration is evidence that the ladder furnished by Swiers to plaintiff Rose Wong was defective. The law is well established that every presumption is made against a wrong-doer.

McBroom's Legal Maxims
8th Ed. 938

It constitutes a wilful destruction, a wilful spoliation of evidence and gives rise to a presumption unfavorable to the defendants, a presumption regarding which the jury should have received instructions.

Silva v. No. Calif. Power Co.
162 P. 412

The action is one for damages occasioned by the alleged negligence in delivering electricity to plaintiff's tankhouse, which resulted in the destruction of the building by fire.

Trial resulted in a verdict and judgment for the plaintiff.

Defendants appealed, alleging error in instructions.

At the trial the defendants offered in evidence certain wires, which they contended were wires from the fire and leading into the tankhouse. Witnesses testified that these either were not the wires, or in the event they were the

same wires, they had been repaired subsequent to the fire.

With reference to such evidence, the court said:

“It is laid down as a well settled rule that all efforts by either party to a suit, directly or indirectly, to destroy, fabricate or suppress evidence may be shown, not as a part of the *res gestae* but in the nature of an admission that the party has no sufficient case unless aided by suppressing evidence or by the fabrication of more evidence. Jones on Evidence, Vol. 1, Sec. 22a.

“The fabrication of evidence is calculated to raise a presumption against the party who has recourse to such practice, not less than when evidence has been suppressed or withheld.”

Wigmore on Evidence

Vol. 12, Third Edition, p. 120, Sec. 278:

“It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party’s falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause’s lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

“* * * The general principle applies in common to all these forms of conduct, it is not necessary, nor is it usually possible, to discriminate the precedents that apply to it in one or another form. Roughly

classifying them, they admit all forms of personal falsification by the party in the course of the litigation; fabrication or manufacture of evidence, by forgery, bribery, subornation and the like * * * suppression of evidence * * * destruction or spoliation of material objects in general or of documents in particular.”

31 C.J.S. Sec. 153—
Evidence

The unexplained and deliberate destruction of relevant documentary or other evidence, or the mutilation of or alteration of such evidence, gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator.

Sec. 152—The maxim “all things are presumed against a wrong-doer” has been frequently applied to unfavorable inferences or presumptions arising from spoliation of evidence; and in so far as it rests in logic is reinforced by the proposition that men do not as a rule withhold from a tribunal facts beneficial to themselves.

Ernest H. Meyer v. Hammond Lumber Co.
9th CCA
84 F (2) 496.

This case involved the alteration of a log book which was evidence in the case. With reference to the penalty for altered evidence, the court in the case quotes from and relies upon the decision of Judge Benedict in *The Tillie*, Fed. case No. 14,048, (which is also from the 9th Circuit) as follows:

“If possible it ought never to happen that a case sought to be supported by a fabricated log book should succeed, * * * if charges of this kind are supported by testimony and remain unanswered in the evidence, they *compel* an adverse decree.

“The legitimate inference in all such cases is that if the true facts were entered in the log book, they would be unfavorable.

Cary-Davis Tug & Barge v. U.S.
(CCA 9)
8 Fed (2) 324

This case also concerned the alteration of a log. In reference to such altered evidence, the court used the following language:

“Once you find it has been tampered with, as I have had occasion to say before in other cases, the court looks with suspicion on the whole matter.”

The Silver Palm et al v. U.S.
(CCA 9)
94 Fed (2) 754

This case involved the alteration of logs of a ship's records. Evidence of the alterations by way of erasure was shown. With reference to this issue, the court said:

Page 762: “The importance of the logbook entries in determining marine causes has always been recognized by courts of admiralty. The alteration of log books by erasure and substitution has long been condemned. It not only casts suspicion on the whole case of the vessel, *but creates a strong presumption that the erased matter was adverse to its contention.* (Citing many cases).

“Once you find there has been tampering with a log, as I have had occasion to say before, the court at once looks with suspicion at the whole matter.

Harvey v. U.S.
215 Fed (2) 330

The case involved the charge of traffic in narcotics. The defendant was represented by counsel selected and employed by him. The witness, Patricia Brown, testified

that she had met the defendant and his attorney in the attorney's office, where she was prevailed upon to take heroin and then was handed a typewritten statement and exhorted to memorize it as her testimony at the time of trial.

With reference to such fabricated evidence the court said:

“Patricia Brown's story of what happened in the attorney's office was clearly admissible, as a fabrication of innocence is cogent evidence of guilt.”

Citing: *Wilson v. U.S.*, 162 U.S. 613, 621, 16 S. Ct. 895, 40 L ed. 1090.

The court then continues to add that such conduct “taints the defense *ab initio*” and is a heinous offence, one which undermines the foundations of our whole system of seeking justice through trial.

Sheehan v. Goriansky
56 N.E. (2) 883

Which case holds that spoliation of evidence, tampering, or alteration is in the nature of an admission from which liability could be inferred.

Equitable Life Ins. Co. v. McDonald
(CCA 9)
96 Fed (2) 437

This case relies upon the rule laid down in *The Oline Rodriguez*, 19 S. Ct. 851, to the effect that spoliation or concealment is a serious offense and authorizes a presumption against the wrong-doer, which presumption remains until it is overthrown by evidence.

It was prejudicial error for the trial court to refuse to instruct the jury with reference to the effect of tampered evidence. The defendants by such evidence admit they had no defense unless they altered the ladder. Having altered the ladder, they destroyed the physical

evidence upon which plaintiff had to rely, nor can it ever be restored. The thing which must occur to each of us is, if the ladder were safe in its condition at the time of the accident, why was it altered? The defendants thus commit a wrong and then profit by that wrong.

From the alteration of the ladder it must be presumed that the ladder in its condition at the time of the accident would establish the plaintiffs' claim that it was defective, and the defendants by such alteration must be held to admit the truth of plaintiffs' contention. It constitutes an admission that the ladder in its condition prior to alteration would operate against them.

10 R. C. L., p. 885.

1 Wigmore on Evidence, 2nd Ed. Sec 291.

McCleery v. McCleery
200 Ala. 4, 75 So. 316

Huber v. Boyle
98 Colo. 360
56 P (2) 1333

When the tampering or alteration was shown, immediately a presumption arose in plaintiffs' favor, a presumption that the defendants Swier had no defense to the case except by the fabrication of evidence, a presumption which is not conclusive, but which rather shifts to them the burden of going forward, the burden of explaining the alteration of the ladder.

Equitable Life Ins. Co. v. McDonald
CCA 9
96 Fed (2) 437

In Anning v. Rothschild & Co.
130 Wash. 232, 235, 226 P. 1013, 1014

In Scarpelli v. Washington Power Co.
63 Wash. 18, 114 P. 870

Nicholson v. Neary
77 Wash. 294, 137 P 492

The burden of going forward shifted to the Swiers, to explain the alteration and upon their failure so to do, the presumption remained. No attempt was made by defendants to rebut the presumption, and plaintiffs were as a matter of law entitled to an instruction with reference to such tampered evidence.

Without exception insofar as we are able to ascertain, spoliation, tampering and alteration of evidence raises an inference and even a presumption that the person is without a claim or defense except by so doing, and the burden is upon him to explain.

Broughton & Wiggins Nav. Co. v. Hammond
Lumber Co.

CCA 9
84 Fed (2) 496

The Etura
CCA 2
147 F 216, 217

We are not unmindful in the presentation of our argument with reference to spoliation or tampered evidence of the established rule that the jury and not the appellate court determines the facts of a case, and that the appellate court will not invade the province of the jury in this respect. The rule, however, is subject to a qualification present in the case before the court, and that qualification is that in the event there has been error of law committed by the trial court which is prejudicial to appellant, the appellate court will then act. Error of law prejudicial to appellants was the failure of the trial court to instruct the jury with reference to tampered or altered evidence.

Defendants did not go forward nor attempt to rebut the presumption. They offered nothing to explain the changed condition of the ladder.

That it is the duty of the court to instruct a jury with regard to the principles of law to be applied to the facts, as determined by them, we feel would need no authority to support it here. The trial court refused, upon plaintiffs' request, to instruct the jury with reference to the presumption raised by altered or tampered evidence, such refusal of plaintiffs requested instructions Nos. 20 and 21, being prejudicial and reversible error.

4. The trial court erred in giving to the jury an instruction with reference to contributory negligence (R. 364-365).

5. The trial court erred in giving to the jury an instruction with reference to assumption of risk (R. 369).

6. The trial court erred in giving to the jury an instruction with reference to unavoidable accident (R. 369).

The instructions in each instance are set forth in *haec verba* at the pages of the record indicated. We do not set them forth in full here for the reason that we do not contend that the instructions are not a correct statement of the legal principles, but rather it is appellants' contention that no instruction should have been given to the jury relating to the three affirmative defenses, i.e., contributory negligence, assumption of risk and unavoidable accident.

Two of these defenses were pleaded affirmatively by the Swiers (R. 9) and all three were among the contentions of the defendants as contained in the pre-trial order (R. 25-26).

There was no eye witness to the fall (R. 260, 121-122), and the only evidence concerning it was the testimony of the plaintiff Rose Wong to the effect that she remembered placing her ladder the morning of the accident (R. 120) and that it was placed solidly with the tongue centered (R. 120) and also tested the ladder by putting weight on it (R. 121), the ground being comparatively

level (R. 121). That at the time she fell, she was on the second rung from the top, (not including the top platform); that she had been picking apples to her left but was not picking or reaching at the time of the fall (R. 122); that she had taken no step but was preparing to descend the ladder (R. 122), and in so doing she turned her body slightly to the right to bring the picking bag from the step so it would not hit and bruise the fruit (R. 123); she was neither leaning nor stretching (R. 123). She further testified that her body was not unbalanced nor was she in any way jerking, shaking or exerting any force on the ladder (R. 123). That both of her feet were on the same rung of the ladder (R. 124) and that simultaneous with her slight movement to the right to bring the apple bag away from the step, she felt the ladder twist and give way and it went from under her (R. 124); that she grabbed for a limb, but that she and the ladder fell to the ground (R. 125) the ladder falling to her left. That is the total evidence offered concerning the occurrence of the fall. No other person gave any testimony of any kind concerning it.

Even though the instructions with reference to contributory negligence, assumption of risk and unavoidable accident may be in proper form, there is no support for them, nor any one of them, in the evidence. The instructions were applicable to the issues as framed by the pre-trial order, but that is not sufficient. They must also be applicable to the evidence and find support therein. The giving of these instructions assumed facts which were not established by the defense—facts with reference to which there is no evidence of any kind.

Instructions must be confined to issues as made by pleadings and by proof, and appellants were entitled to instructions so based. To give instructions unsupported by evidence is reversible error.

Cantrill v. Am. Mail Line

257 P (2) 179; 42 Wash. (2) 590

Elm v. McKee
283 O (2) 827; 139 C.A. (2) 353

Leavitt v. DeYoung
263 P (2) 592; 43 Wash. (2) 701

Rathke v. Roberts
207 P (2) 716; 33 Wash. (2) 858

Gould v. Witter
117 P (2) 210; 10 Wash. (2) 553

Leer v. Cohen
116 P (2) 535; 10 Wash. (2) 239

Scandalis v. Jenny
22 P (2) 545; 132 CA 307

Kellerher v. Porter
189 P (2) 223; 29 Wash. (2) 650

To cite further authority for that contention, would we feel be merely cumulative. It is the duty of the trial court in submitting a case to the jury to confine its instruction to issues raised by pleadings and proof, and the submission to the jury of issues raised by pleadings but unsupported by any proof constitutes prejudicial and reversible error.

7. That the jury did not understand the instructions of the court with reference to the measure of damages is conclusively shown by the question returned with the verdict (R. 34), when inquiry is made by the jury as to whether, if they found in favor of plaintiffs, they were to consider the life expectancy of plaintiff Rose Wong in computing those damages.

The question and the verdict are in irreconcilable conflict. In one breath the jury finds for the defendants and in the same breath inquires relative to the method of computing damages for the plaintiff.

VIII. CONCLUSION

We respectfully urge that the verdict of the jury and the judgment entered thereon must be reversed for error of the trial court in the trial of the case and the submission of the issues to the jury. The jury was not instructed with reference to evidence which had been tampered with or altered and gave no consideration to such fact. The jury received no instruction on a point of law involved in the determination of the issues, i.e., tampered evidence, and were instructed on principles of law which had no basis in evidence.

The verdict and question returned by the jury represent an inconsistent determination, upon which no judgment for the defendants might be entered.

To permit a judgment supported by evidence which was tampered with and altered is to reward the spoliator for his wrong. The judgment must be reversed and a judgment entered in favor of the plaintiffs for the amount prayed for in their complaint.

Respectfully submitted,

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No. 16116

IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

ROSE WONG and KENT WONG,
Appellants,

WALTER SWIER and LAURA SWIER,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF OF APPELLEES

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FILED

JAN 26 1959

PAUL P. O'BRIEN, CLERK



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SOUTHERN DIVISION

BRIEF OF APPELLEES

JURISDICTION

This is an action by appellants, plaintiffs below, residents and citizens of the State of Idaho, against appellees, defendants Swier below, residents of the State of Washington, for damages sustained by plaintiff Rose Wong, while in the employ of said defendants, as a result of a fall from a ladder furnished to her by them in such employment (R. 21-22). Jurisdiction of the trial court was

invoked by reason of diversity of citizenship between the parties in accordance with USCA, Title 28, Sec. 1332. Jurisdiction of this court in invoked by reason of USCA, Title 28, Sec. 1291.

Judgment in the court below was entered March 28, 1958 (R. 35). Motion to set aside verdict and judgment and to enter judgment for plaintiff, or in the alternative for a new trial, was filed April 4, 1958 (R. 36-38), and this motion was denied May 28, 1958 (R. 46-47). Notice of appeal was filed June 16, 1958 (R. 47), and cost bond was filed June 16, 1958 (R. 48-49).

STATEMENT OF THE CASE

Appellants in their statement of the case have omitted many relevant and material facts, which appellees deem necessary to state, and appellants have also left a number of inaccurate impressions, which should be corrected, in order that this court may more easily view this case fully and accurately. Therefore, appellees deem it necessary to make their own statement of the case, which is set out under subheadings, so that the various matters involved in this case may be more easily and quickly understood, as follows.

Background of Relationship Between Appellants and Appellees and Omissions in Appellants' Statement Concerning Themselves

Since appellants have dwelt upon the above subject in their opening brief and left erroneous impressions concerning the same, appellees have been constrained to

correct such impressions and, since appellants went into such background and their status, to supply their omissions.

The Swiers were intimately acquainted with the Wongs, having known Rose Wong 12 or 13 years before her husband (R. 55), he being a Chinese man (R. 85). She was then a missionary in China and came back and made her home on the Swier ranch (R. 55). The acquaintance started as a religious and sympathetic one, as Mrs. Wong needed a home and the Swiers provided a home for her (R. 55). Mrs. Wong mentioned that she had resided in the same tenant house on the Swier ranch before to assist them in religious work (R. 129) and acknowledged that she had become acquainted with Mr. and Mrs. Swier through missionary work (R. 110). According to Mrs. Swier, Mrs. Wong had been a missionary friend of theirs for many years and a personal friend for the last 13 years before the trial (R. 307).

Mr. and Mrs. Wong came to the Swier ranch in June, 1955, to make their home there (R. 110, 307), and the Wong family continued to reside on the Swier ranch, in the same tenant house, with the Wong children sleeping in the Swier home, until June, 1956 (R. 253). No rent was ever asked, suggested or contemplated (R. 127-128, 258).

During the time that Mr. and Mrs. Wong were at the Swiers', which was from June, 1955 (R. 110), they were

busy helping Mr. and Mrs. Swier carry on Sunday school work in Cowiche, Washington (R. 136), where the Swiers lived. They even stayed in Cowiche until the first of August, 1957 (R. 137), when they moved back to Portland, Oregon, having left there in June, 1955, to live at the Swiers' (R. 110).

Mrs. Wong was injured October 17, 1955 (R. 24), and Mrs. Swier visited her every day in the hospital for the first month and quite often thereafter (R. 308), and the Swiers had the Wong family for Christmas Day, 1955, and gave them their Christmas dinner (R. 308). After the Wongs moved back to Portland, plaintiff Rose Wong corresponded with defendant Laura A. Swier, addressing her as "Dear Sister Swier" (R. 195, Ex. 19).

Two years before the Wongs arrived at the Swier ranch in June, 1955, the elder Wong son had made his home with the Swiers in the summer of 1953 (R. 252). In the fall of 1954 this boy and the two eldest Wong girls came to live with the Swiers and continued to sleep in the Swiers' own house even after their parents' arrival in June, 1955. For 8 months prior to their parents' arrival the Swiers had been taking care of these three children (R. 111, 112, 134, 253). According to Mr. Swier this care was gratis (R. 258-259).

Appellants' situation, when they came to the Swiers' in June, 1955, was that they were penniless, had no contract of any kind to go out in the missionary field, and

depended upon the Swiers for their livelihood (R. 136-137, 258-259). There had been some sort of a settlement of a previous contract to do missionary work, but Mrs. Wong refused to divulge what the settlement was (R. 134).

After the Wongs moved back to Portland, they were able to pursue their former work, as they carried on bible studies in their home, which was after the accident, and they were offered regular services for the Open Bible Church at Portland (Ex. 19).

No Tampering or Change in the Ladder

Exhibit 1 is the ladder which was furnished to appellant Rose Wong at the outset of apple picking in the fall of 1955 (R. 56, 254-255). This is a 10-foot ladder (R. 256, Ex. 1). She used this ladder every day, picking apples, during the course of apple picking, which was 8 or 10 days up to the date of the accident (R. 116-117, 255), every day from 8:00 A. M. to 5:00 P. M. with one hour out for lunch (R. 116-117, 255), and all that period of time she used the ladder in question (R. 255, Ex. 1), which is uncontradicted.

After said appellant's fall from the ladder, which was October 17, 1955, about 11:00 A. M. (R. 118), the ladder was taken to Dependable Ladder Company, Yakima, Washington, for safe-keeping (R. 197, 272, 279), where it was kept until the time of the trial and then was placed in custodia legis (R. 347-351). The ladder had been in

dry storage at Dependable Ladder Company for over 2 years as of the time of the trial (R. 197).

It is appellants' contention that between Friday preceding the commencement of the trial on the following Monday and the day that the ladder was admitted into evidence during the trial, it was tampered with (Opening Brief of Appellants 18-19).

Robert I. Bounds, who, with Mr. Splawn, brought the ladder, the morning of the trial, from Dependable Ladder Company to the courtroom, at the instance of appellants' counsel, testified that the ladder, when picked up that morning, was in the identical place and position at Dependable Ladder Company as it was when appellants' counsel inspected it the Friday before the trial, that it was brought directly to the courtroom, that nothing further was done to the ladder, and that they left together after it was placed in the courtroom (R. 347-351).

Herbert Rossow, an expert witness for appellees and the owner and operator of Dependable Ladder Company, where the ladder was stored for 2 years immediately preceding the trial (R. 197) and in whose care it had been (R. 279), a manufacturer and repairer of orchard ladders, step ladders and all kinds of ladders (R. 270-271), who had been in the ladder business 6 years (R. 272), had become familiar with the ladder in question (R. 272), which had been brought to his place of business to be kept (R. 272).

While the ladder was there, he had inspected and tested it (R. 273). When it was brought in, he checked it over (R. 274). When appellants' counsel made their first inspection of it about a year before the trial, he attended that inspection (R. 274), whereat the ladder was laid horizontally on a table, with the tongue lying in the center of the ladder, and then at the bottom of the ladder the end of the tongue was moved to one side and then to the other, and the arc or play at the bottom was approximately 4 inches from the center to one side and not so much from the center to the other side (R. 274-275). He inspected the ladder himself on this occasion and examination and loaned his ruler to Mr. Hudson, of appellants' counsel, to measure the arc or width of play of the tongue at the bottom of the ladder (R. 274-275). He observed Mr. Hudson's measurement of that arc and it was 4 inches (R. 275). The over-all radius of the arc or play on both sides of the center was about 6 inches (R. 281).

This witness examined the ladder in the courtroom, testing it for its play or looseness (R. 274), which was the fourth day of the trial, and testified that he could not find any change in it (R. 275), stating that he had seen the ladder practically every day for the past year in his warehouse and that, although it had been moved around in the warehouse, he could not find any change in it (R. 275).

With respect to the washers at the top, at the bolts, he testified that there were two washers on one side and one on the other side and that those washers were there when the ladder was brought into his shop (R. 275-276).

He testified that he was present on the respective occasions when Messrs. Brazil, Hovde and Clark examined and tested the ladder, who were expert witnesses for appellees, which occasions were at Dependable Ladder Company (R. 276) and that the ladder in the courtroom was in the same condition as it was then (R. 277).

He also testified that the ladder had been in his care ever since it had been brought to his warehouse (R. 279), and on re-direct examination that, with respect to the over-all play of the tongue, there was no difference from what it was on the occasion when appellants' counsel examined it a year before or on any other occasion when he had examined it (R. 282) and that he could not see where the ladder was changed in any way, shape or form from the way it was the day it was brought into his warehouse (R. 282).

Louis C. Moritz, an expert witness for appellees, testified that he thoroughly examined and tested the ladder at Dependable Ladder Company approximately 3 weeks before the trial (R. 285-288), and he examined it in the courtroom the day he testified, which was the fourth day of the trial, particularly with respect to the play in the tongue from the looseness at the hinge and he then testi-

fied that the ladder was no different from what it was before (R. 285-289, 291-294).

David Swier, an adopted son of appellees, employed on their ranch when appellant Rose Wong was injured (R. 300), prepared the ladders, including this one, on the Swier ranch, for the apple harvest in the fall of 1955 (R. 304). He is the one who put the washers on the bolts at the top of this ladder, when he prepared the same that fall (R. 304).

While the ladder was still at the ranch and after appellant Rose Wong fell off it and before it was taken to Dependable Ladder Company to be kept, this witness examined the ladder (R. 303). From that time to the fourth day of the trial, when he testified, he had not had an opportunity to examine the ladder again (R. 303). He examined the ladder in the courtroom, particularly the looseness or play in the tongue, the assembly at the top, and the bolts and nuts thereat (R. 304), and there was nothing about the ladder different from the way it was when it was on the ranch, before it left the ranch (R. 304).

Appellee Walter Swier examined the ladder in the winter of 1955, after the fall, together with Mr. Wong (R. 263) and moved the tongue laterally, at the bottom of the ladder, and its arc was 3 inches one way and 4 inches the other, from the center of the ladder, with the ladder lying flat and the tongue on top (R. 264, 294-295), which was not contradicted by Mr. Wong when he testi-

fied. Mr. Swier measured it with a steel rule and Mr. Wong was with him (R. 294).

During the course of the trial Mr. Swier tested the ladder and he could see no appreciable difference whatever (R. 295) and described the ladder at the trial as being identical with the way it was before, including the play (R. 295).

Appellants' counsel, Miss Loveland and Messrs. Hudson and Mullins, testified, which testimony is referred to in the Opening Brief of Appellants at page 19, and in this connection perhaps it should be mentioned that Miss Loveland is a sister of appellant Rose Wong (R. 268), that Mr. Hudson testified that he had no financial interest in the case (R. 317-318), and that neither they nor Mr. Mullins recorded in any manner any measurements taken (R. 332).

It is interesting to note that there is a total absence of any testimony or other evidence as to who, if anyone, might have tampered with the ladder and that it could be to appellants' advantage, just as much as to appellees', to have it tampered with, if there were any advantage at all. Appellees' counsel stated in the trial judge's chambers, at the proceedings which occurred there (R. 218), that the ladder had not been tampered with at all and that he was informed that the measurement of the arc of play was the same (R. 218-219), so the remark attributed to him at page 30 of the Opening Brief of Appellants is

brought out of the context of the entire discussions and a full examination of the immediate context reveals that it relates to an assumption made by the court for the purpose of a demonstration by the witness Clark.

Safeness of the Ladder

Cecil C. Clark, an expert witness for appellees, who estimated that he had actually spent 10,000 hours on orchard ladders, having devoted 40 years of his life to orcharding and the handling of ladders (R. 198) and at the time of the trial operated 321 fruit picking ladders and estimated he had borrowed in the past 1,000 or more (R. 199), testified that the ladder in question (Ex. 1) was much better than the average ladder used in the Yakima Valley, including all its aspects as it stood in the courtroom (R. 205); that a picker on that ladder, in order to fall, had to do one of two things: (1) place the ladder improperly, set it up wrong or (2) lean too far out (R. 206-207); that he had fallen off ladders a number of times just simply because of reaching out too far to get the last fruit, without getting down and moving the ladder (R. 207); that reaching out too far will nearly always make a ladder tip over and the other cause is improper setting (R. 207); that the condition at the top of the ladder would make no difference with a person standing on any step, clear to the tenth (R. 207); that he was perfectly satisfied that the ladder was safe (R. 208) — the ladder as it stood right there in the courtroom (R. 209); that you can stand a ladder up, used or new, with no one on it, and

push in on one side and cramp the ladder (R. 209); that a new ladder would be no better than the ladder in question to pick on (R. 209); that, if you get the top all tight and everything tight, a ladder is more apt to tip over, because, if it is loose, it will absorb movement and, if it is tight, it will twist when a picker leans and over it will go (R. 209-210); that, if one stood on any rung of the particular ladder, including the top, and did not reach out unduly or not over-balance, there could not possibly be any action occur anywhere in the ladder, including any action at the very top and the assembly at the top, that would cause the ladder to tip, collapse, fall to one side or to move in any direction, if the ladder were properly set (R. 210); that, if a picker has the ladder set off balance, then it could go down (R. 210) and that such was true of brand new ladders as well (R. 210); that, although the ladder had ben in dry storage for over 2 years, it was still tight, that there was not excess movement in the top, and that it was in first-class condition and satisfactory to pick on (R. 211).

This witness was then given a hypothetical question embodying exactly, no more and no less, what appellant Rose Wong said she did with and on the ladder at the time of the accident, viz., (1) the ladder was set solidly on disced ground, (2) the tongue was centered and placed properly, (3) she was standing on the eighth rung from the bottom, (4) not climbing up or down or moving her

feet, (5) only turning the trunk of her body slightly to the right while so positioned, in order to ease off the pressure of the picking bag approximately half full of Delicious apples from the ladder, preparatory to come down, but neither foot being taken off to come down, and (6) the ladder tipped over (R. 103-104, 119-125, 211- 212).

Mr. Clark answered that the ladder would not move any at all, that it could not collapse, twist or do anything, and that he was referring to the identical ladder in question (R. 212).

He further testified that, if it were properly set, then the only thing which could cause it to tip would be leaning too far, reaching for those apples one ought to re-set the ladder to get, and that normal turning and moving around on the ladder, including turning to bring a bag of apples down, would cause no movement or trouble of the ladder whatever (R. 212).

On cross-examination Mr. Clark testified that he had inspected the ladder in the courtroom just before his testimony (R. 222); that a hole in a hinge much larger than the bolt would not tend to give more opportunity for the ladder to twist at the top, with a person standing on the ladder (R. 224); that the larger diameter of the hole and the looseness of the connection would make no difference (R. 224); that, in fact, you could put sixteen-penny nails in there, set the ladder up and get it centered properly and use the ladder and it would be just as safe, because

the weight of the picker is against the bearing and it will not shift (R. 224).

Further, on cross-examination, he testified that standard ladders are only used, there not being ladders to suit each person's individuality and idiosyncracies (R. 226).

On re-direct examination this witness testified that dexterity or lack of dexterity of a picker would have no effect upon the ladder, that it was just as safe for a solid person as a wiry person or for a person who was stiff as one who could swivel easily (R. 229).

C. A. Brazil, an expert witness for appellees, testified that he had examined the ladder and its various features before the trial (R. 234); that he had found some play in the tongue of the ladder at the top assembly (R. 234); that the ladder in its condition was one in common use in the Yakima Valley (R. 235, 237); that the play or looseness referred to at the top—that that feature—would have no effect upon the safety of the ladder for apple picking purposes (R. 235); and that the explanation for that statement is that (1) it is necessary to have some play in the top of the tongue (R. 235), (2) if a person climbed up the particular ladder and even completely to the top and the ladder is properly set, the play or looseness referred to can have no effect to cause the ladder to tip or collapse or go in any direction (R. 236) and that he could not see how the ladder could tip over if it were properly set (R. 236), (3) in order to make the ladder tip over it would

probably require a reaching out beyond the reach of a person on the ladder, in other words, to stretch out to a point where the weight of the body is way off the center of the ladder (R. 237), and (4) a person's dexterity on the ladder, if it is properly set, would be no factor, i.e., the safeness of the ladder would not vary with the build or dexterity of the pickers using it (R. 237).

On cross examination he testified that a little bolt going through a big hole at the hinge at the top of the ladder would not provide more opportunity for the ladder to twist and become unbalanced, that it would not affect it, and that it would make no difference in the stability of the ladder (R. 240).

Also, this witness further testified that the looseness at the hinge of the particular ladder was not unusual in respect of ladders in common use in the Yakima Valley (R. 240); that, if the ladder were properly set and the tongue was straight forward when the ladder was being used, the play in the hinge would have no effect upon any twisting or moving of the ladder (R. 241); that you can take a brand new ladder that has never been used and is absolutely rigid at the top, i.e., at the hinge, and set it on a floor or any surface and you can press in on one leg and cramp it or put it into a torque just as easily as with a used one, such as the ladder in question (R. 241).

On recross examination this witness further testified

that the looseness at the hinge did not detract from the safety of the ladder (R. 242).

Ben Hovde, an expert witness for appellees, characterized the ladder as average or above average compared with the ladders in common use in the Yakima Valley (R. 245); that the looseness at the top or any amount thereof would have no effect upon the stability or safety of the ladder, if the ladder were properly set (R. 245); and that it was absolutely a normal ladder, which most all farmers used, and was good and solid (R. 245).

He was then asked a hypothetical question embodying exactly, no more and no less, what appellant Rose Wong said she did with and on the ladder at the time of the accident, and he answered that the looseness or play at the top or any amount of looseness there would have no effect so as to cause the ladder to tip, sway or collapse and that, if the ladder were set properly, as she said that she did, it would not move unless one leaned too far (R. 245-246).

On cross examination he testified that longitudinal cracks on a leg of the ladder would have no effect upon the strength thereof and would not affect it so it would twist (R. 246-247); that the hole in the hinge being larger than the bolt, with weight on the ladder, would make no difference (R. 249) and the looseness would have no effect to make the ladder twist (R. 250); and that the more rigid a ladder is, the easier it is to tip (R. 250).

Herbert Rossow, an expert witness for appellees, testified that he had examined and tested the ladder and the top part (R. 273); that the looseness at the top did not make any difference (R. 273); and that, if the ladder were properly set, explaining what was meant by such term, it did not make any difference how much looseness was in the top in respect of the safeness of the ladder (R. 277).

Louis C. Moritz, an expert witness for appellees, testified that he tested the ladder and found it to be safe (R. 287-288), which was approximately 3 weeks before the trial (R. 288).

He, too, was asked the same hypothetical question and answered that the ladder could not conceivably tip under the circumstances related by appellant Rose Wong (R. 289).

He testified that the ladder, if properly set, could not tip or collapse unless the picker got himself overbalanced (R. 289-291); that you can set up a ladder, center the tongue, and push on one side and make any ladder cramp (R. 290); that with weight on the ladder, such as Mrs. Wong, there is nothing to cause the ladder to tip or collapse or fall over because of any play or looseness at the top (R. 290); and that for ordinary picking activities there was nothing about the ladder to make it unsafe for ordinary picking purposes, including reaching for apples, putting them in a bag, and coming down (R. 291).

He also testified that, even if the ladder were looser at the hinge than it was, such still would definitely not make the ladder unsafe (R. 294).

Appellee Walter Swier's experience orcharding with orchard ladders had been all his lifetime, since about 1918, and in the Yakima Valley (R. 268-269). According to him, the condition of the ladder, at the time appellant fell, including the looseness and play, was average or better than average (R. 270).

Apple picking began on the Swier ranch, according to appellant Rose Wong, either the last of the first week in October, 1955, or the first of the second week (R. 116), and according to Mr. Swier it began 8 or 10 days before the date of the accident (R. 255).

By her own admission appellant Rose Wong understood about the setting of a ladder and the use of a ladder (R. 115), and there was no need to educate or teach her concerning the setting of a ladder for picking fruit (R. 115). She had learned to set a ladder properly and carefully (R. 115), and she could manipulate a ladder and could set it herself (R. 115).

During the course of apple picking up to the time of the accident, she set her own ladder (R. 117) and did not have anyone do it for her (R. 117). She did not pick her own trees entirely (R. 117), as she and her daughter were also picking on the tree where she was injured (R.

119, 340), and Mr. Swier observed that she picked with her husband, son and daughter (R. 256).

Mrs. Wong had previous experience picking from a ladder, as she had picked pears for the Swiers earlier that fall, in September, for approximately a week, picking every day (R. 114, 253), and in pear picking she used and handled her own ladder (R. 114, 253), moving it around each tree she picked and setting her own ladder (R. 114).

During the course of apple picking up to the time of the accident, she experienced no difficulty or trouble with respect to the ladder (R. 117, Ex. 1).

Mrs. Wong said that she never complained to Mr. Swier or anyone else about her ladder or anything concerning the ladder (R. 117) and that she would have had no reluctance or hesitancy to speak to him or to complain about the ladder, if there had been any reason to speak or to complain concerning it (R. 117-118). She said that, if she had observed a flaw in the ladder, she certainly would have told him (R. 346).

Mrs. Wong testified that during all the time she used the ladder she experienced nothing and observed nothing that indicated to her that the ladder was unsafe or that there was anything wrong with it (R. 346-347).

In the use of the ladder any looseness in the top as-

sembly did not manifest itself to her (R. 347) and she felt safe on it (R. 346-347).

When Mr. Swier furnished the ladder in question to the Wongs, he told them to report to him anything wrong with the ladder, and no report was ever made to him concerning this ladder or any other of the 4 ladders furnished to them (R. 295-296).

There was no sound of any play or looseness when she fell (R. 127).

According to Mr. Swier no complaint was ever made to him by either Mr. or Mrs. Wong about any lack of knowledge as to how to go about picking or to handle a ladder (R. 254-255).

Mr. Swier and his son, David, who was employed on the ranch, each season before picking, went over all the ladders to see if they were in shape to pick and did whatever was necessary to put them in such shape (R. 57), and such applied to the ladder in question (R. 58).

Appellant Rose Wong, describing the accident, said that she set the ladder carefully, testing it on both sides to see that it was well-balanced, and then ascended the ladder to the eighth rung (R. 103).

Neither Mr. nor Mrs. Wong, following the accident and during that winter, ever claimed that anything was wrong with the ladder (R. 266-267).

George Mullins, one of appellants' counsel, acknowledged that on March 15, 1958, the date of their first examination of the ladder, the expert witness, Herbert Rossow, stated that the ladder was perfectly safe (R. 333).

Qualifications of Appellees' Expert Witnesses

None of appellees' expert witnesses were acquainted with appellees or had any connection with them, or they with such witnesses, except Cecil C. Clark, whom Mr. Swier had met about a year and a half previously, but that was all except that they both belonged to Washington Cannery's Coop. (R. 298-299).

All appellees' expert witnesses were exceedingly well qualified in their field and had achieved positions of distinction and honor (R. 233, 235-236, 198-202, 243-244, 283-284).

Their expert knowledge of apple-picking ladders also came from large experience throughout the Yakima Valley (R. 204, 233-235, 243, 270-272, 283-285), probably the largest apple-producing area in the West.

No objection was made to their qualifications and such were accepted except as to Cecil C. Clark (R. 203) and Herbert Rossow, the objection as to the latter being that he was only a manufacturer and repairer of orchard ladders (R. 277).

Causes of Appellant Rose Wong's Fall

There are many combinations of evidence as to what

caused said appellant to fall off the ladder, and from the total of such combinations, including all reasonable inferences, the jury could easily find sufficient basis for either contributory negligence, assumption of risk or unavoidable accident, as follows.

As to contributory negligence, the expert witness Clark testified, for instance, that in order to fall from the ladder in question a picker had to do one of two acts: (1) set the ladder improperly or (2) lean too far out (R. 206-207). The expert witness Brazil testified, for example, that in order for said ladder to tip over, it would probably require a reaching out beyond the reach of a person on the ladder, i.e., stretching out to a point where the weight of the body was far off the center of the ladder (R. 237). The expert witness Hovde testified, for example, that, if the ladder were set properly, as said appellant said that she did, it would not move unless one leaned too far (R. 245-246).

As to assumption of risk, the expert witness Moritz testified, for example, that an overbalance of the picker, which can happen to anyone and is a risk naturally and ordinarily incident to or inherent in the work which said appellant was doing, could cause the ladder to collapse (R. 290). Reaching out too far to get the last apples, which is human nature (R. 212), which is a natural incidence connected with the work of apple-picking (R. 207) or leaning over too far (R. 246), which is the most prob-

able act that might happen in apple-picking (R. 237), are also natural and incidental risks connected with apple-picking and a part of the hazards naturally incident to or connected with such type of work (R. 207, 212).

David Swier was picking about 3 rows from said appellant when she fell (R. 301). He rushed over and saw her lying on the ground (R. 260, 302) and the ladder was tipped, leaning against a limb, with the legs of the ladder on one side of a pile of boxes full of apples stacked 3 high and the tongue on the other side of the pile of boxes (R. 302-303), indicating that she had set her ladder over this pile of apple boxes. When he arrived where she was lying, she said "something about, something on the order of reaching too far and falling and striking her leg on the box" (R. 303). Walter Swier testified that, after appellant Rose Wong returned to his ranch from the hospital, the latter part of December, 1955, he asked her what had brought on her fall (R. 260-261) and that she replied that she did not know definitely but that as near as she could remember she had reached out for some apples as she was about to finish the tree (R. 262). Certainly the jury could visualize an overbalance of the picker and that it was a risk naturally and incidentally connected with apple-picking from a ladder.

The ladder was not broken (R. 260). Said appellant said that the orchard was irrigated by corrugations or ditches and that she was aware of that during the course of

the apple-picking (R. 117). The irrigation ditches or corrugations in the surface of the ground ran north and south (R. 259). The picking rows did not coincide with the irrigation ditches (R. 259). The ground at the place where the ladder was set, when the fall occurred, was disced (R. 259) and, according to said appellant, there was a softness because of the discing (R. 121). There was grass in the orchard and she could manipulate her own ladder unless the grass was unduly long (R. 116). She described her fall as, when she turned her body, there was a quick give of the ladder and that it went out from under her feet (R. 104). Certainly the jury could visualize that one or the other of the members of the ladder, i.e., either a leg or the tongue, went down in a soft spot or slipped on the grass, if the jury believed that there was no other cause. The jury could also visualize that one or the other of the members of the ladder slipped down the side of an irrigation ditch or corrugation, creating the sensation of a quick give and no sound, as she testified (R. 127), at the top of the ladder or anywhere else on the ladder, or any creaking, to indicate any play or looseness when it gave.

There lay before the jury a whole picture involving an apple orchard with a cover crop of grass, disced ground with a softness in it, irrigation ditches or corrugations running on a bias with the picking rows, the conformation of apple trees and the ladder itself, and what from common knowledge one has to do in order to utilize a ladder

to pick an apple tree, and the commonly known hazards there are to that type of work. As aptly stated, conditions are seldom ideal in an apple orchard (R. 228).

As to unavoidable accident, the jury could believe, as previously set out in appellees' statement of the case, that the ladder was perfectly safe, that said appellant properly set it, and that she did not incur any of the risks attached to apple-picking, as above referred to, so that the accident was plainly and simply an unavoidable one, purely accidental, without any negligence on the part of anyone and no assumption of risk. The testimony as to the safeness of the ladder combined with her own testimony would certainly raise a basis for unavoidable accident. An apple orchard and the picking of apples from a ladder pose many factual combinations as a matter of common knowledge, and also in this case there were many combinations of evidence and their reasonable inferences, as well as the ladder itself.

ARGUMENT

Appellees' argument is divided into 3 subheadings, the first dealing with specifications of error numbered 1, 2 and 3; the second dealing with specifications of error numbered 4(a), 4(b), 5 and 6; and the third dealing with specification of error numbered 7.

Appellants Not Entitled to Peremptory Instructions Directing Verdict or Finding as Matter of Law that Appellees Were Guilty of Tampering and that Their Case was Affected Thereby

An issue of fact clearly existed as to appellants' contention that the ladder had been tampered with and was changed, which issue is clearly pointed out in appellees' statement of the case, beginning at page 5 of this brief. Certainly it was not error to refuse to direct a verdict and to give appellants' proposed instructions numbered 20 and 21 in the form and content in which they were proposed.

Appellants argue that there was no issue of fact presented in the case as to their contention of tampering and change and, therefore, a directed verdict should have been made and said proposed instructions given, which are peremptory and assume as a matter of law appellants' contention.

It is argued by appellants that a presumption arose so that the court should have instructed as a matter of law upon the subject, since there was no evidence or inference to rebut such presumption. Appellants cite three Washington cases at pages 35 and 36 of their opening brief. The first case, *Anning v. Rothschild & Co.*, 130 Wash. 232, 226 Pac. 1013, cites and quotes from the second cited case, *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870, as follows:

“A presumption is not evidence of anything, and only

relates to a rule of law as to which party shall first go forward and produce evidence sustaining the matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponents' *prima facie* evidence with evidence and not presumptions. A presumption is not evidence of a fact but purely a conclusion. Elliott Ev. §§ 91, 92, 93; Wigmore Ev., §§2490, 2491."

The third Washington case cited in appellants' opening brief, *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492, sets forth the same rule.

It seems to appellees that appellants' argument upon their first three specifications of error is entirely unfounded in view of the evidence, to which this court has been referred in appellees' counter statement of the case. Also, appellants' proposed instructions are couched in such form and content that they are peremptory and are not conditioned upon the jury's first finding from the evidence the contended fact and then, if they so find, to treat such as evidentiary. In other words, this was a factual issue at the most and no instruction should have been given upon the subject, unless it were presented to the jury in such form and content as to require, first, a finding by them favorable to the contention of appellants, and, of course, the proposed instructions utterly fail to do this, so the

trial court was entirely justified in refusing to give such proposed instructions. These proposed instructions were tied to one another.

It does not seem to appellees necessary to cite any further authority for this proposition, as the same is fundamental.

Trial Court's Instructions on Contributory Negligence, Assumption of Risk and Unavoidable Accident Were Proper

Again, viewing the evidence, as referred to in appellees' counter statement of the case, under the subheading *Causes of Appellant Rose Wong's Fall*, the Court was entirely justified, when requested, to give the instructions it did on these legal propositions in view of all the combinations of evidence and the legitimate inferences draw-able therefrom.

It is fundamental that a party is entitled to have his theory of the case presented to the jury by proper instruction if there is any evidence to support the theory. *Getz-enderaner v. United Pacific Insurance Company*, 152 Wash. Dec. 28, 322 P. (2d) 1089.

All that appellees can say is that there were sufficient combinations of evidence and reasonable inferences to furnish a sufficient basis for any one of said three instructions which appellants argue should not have been given.

Appellants do not contend that the instructions given on contributory negligence, assumption of risk and un-

avoidable accident are incorrect statements of the law (see Opening Brief of Appellants at page 37), and no contention is made that these issues were not posed in the pleadings or pretrial order, as appellants' opening brief at page 37 states that all three appeared in the pretrial order and that all three were applicable to the issues framed thereby, so there is no argument that they are not correct statements of the law or were not applicable to the issues framed in the case.

Their contention is that there is nothing, as a matter of law, in the evidence to lay a basis therefor (see Opening Brief of Appellants at page 38). This argument or statement is not amplified; appellants merely make the statement but do not argue or explain why or how there is no basis for any one of said instructions.

***Jury's Question Was Not a Part of Verdict or
Returned Therewith***

The question referred to in appellants' opening brief, at page 26 thereof, was not attached to the verdict (R. 42).

The affidavit, which is uncontradicted in any respect, appearing in the Record at pages 41-42, states that the yellow piece of paper, which is the question referred to by appellants, was handed to the bailiff 45 minutes before the jury returned its verdict, so that the same is no part of the verdict and is not connected therewith. Obviously, therefore, any consideration by the jury of the matter

contained in or referred to in said yellow piece of paper, was resolved by the jury's verdict, which is independent and separate and was returned later.

Appellants argue that in some manner or other this demonstrates that the jury misunderstood or was confused and that the verdict and the question are in irreconcilable conflict. The latter part of the argument has been answered above, and with respect to the former part of the argument, it seems to appellees that it is an attempt to impeach the verdict and, if it is such an attempt, it is fundamental that it cannot be accomplished in this manner. Whatever the jury may have considered, even though misunderstood, if such were actually the case, the same inheres in the verdict and cannot impeach it. 53 AM. JUR., Trial, §1105 et seq.

Since appellants raised the issue in their motion to set aside the verdict or for a new trial (R. 36-37), without any supporting affidavit or other evidentiary presentation, appellees felt it incumbent to serve and file an affidavit (R. 41-42), which remains uncontradicted in the record, to the effect that the yellow piece of paper of a question occurred 45 minutes before the jury returned its verdict and was no part of it and not connected therewith.

There remains only one possible topic involved in appellants' opening brief, viz., they say that appellees were bound to furnish a safe ladder and what is meant by that term. The standard is a reasonably safe ladder (R. 29),

as the pretrial order states that the issue as to the ladder was that appellants had to prove that it was not a safe ladder for the use for which it was intended and furnished, according to the standard of the law of the State of Washington (R. 29). That standard, of course, is reasonably safe. *Hoffman v. American Foundry Company*, 18 Wash. 287, 289, 51 Pac. 385, 386; *Le Claire v. Washington Water Power Co.*, 83 Wash. 560, 566, 145 Pac. 584, 586; *Griffith v. Washington Water Power Co.*, 102 Wash. 78, 80, 172 Pac. 822, 823; *Haines v. Coastwise Steamship & Barge Co.*, 104 Wash. 685, 689, 177 Pac. 648, 649; *Steven v. Hines*, 110 Wash. 579, 586, 188 Pac. 917, 920; *Frierhood v. Oregon-Washington R. & N. Co.*, 134 Wash. 178, 180, 235 Pac. 17, 18; *Wehtje v. Porter*, 183 Wash. 177, 179, 48 P. (2d) 212; *Cantrill v. American Mail Line*, 42 Wn. (2d) 590, 597, 257 P. (2d) 179, 183.

Respectfully submitted,

HOMER B. SPLAWN
Attorney for Appellees

Suite 318, Larson Building
Yakima, Washington



No. 16117 ✓

United States

*See also
Vol. 3091*

Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SEBASTOPOL APPLE GROWERS UNION,
Respondent.

Transcript of Record

In Three Volumes

VOLUME I.

(Pages 1 to 432, inclusive)

Petition For Enforcement of An Order of
The National Labor Relations Board

FILED

FFB 12 1959

PAUL P. O'BRIEN, CLERK



No. 16117

United States
Court of Appeals

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 9

United States of America

Before the National Labor Relations Board

Case No. 20-CA-1035

SEBASTOPOL APPLE GROWERS UNION

and

GENERAL TRUCK DRIVERS, WAREHOUSE-
MEN AND HELPERS UNION, LOCAL No.
980, AFL.

COMPLAINT

It having been charged by General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL, that Sebastopol Apple Growers Union has engaged in, and is now engaging in, unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 29 U.S.C.A. 141, et seq. (Supp. July 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by Rules and Regulations of the National Labor Relations Board, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Sebastopol Apple Growers Union, hereinafter called the Respondent, a California corporation, is

General Counsel's Exhibit No. 9—(Continued)
engaged in the business of packing, canning and shipping apples and apple products. Respondent's plant and offices are located at Molino Station, Sebastopol, California. During the fiscal year ending May 31, 1954, the Company purchased raw materials, supplies and equipment valued in excess of \$400,000. During the same period of time the Company sold finished products valued in excess of \$1,000,000, of which amount approximately \$380,000 represented shipments made by the Company from its plant located at Sebastopol, California, to places located outside the State of California.

II.

General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III.

The Respondent terminated the employment of the following employees on or about the dates set forth opposite their names, because they, and each of them, joined or assisted the Union, or engaged in other concerted activities for the purpose of collective bargaining, or other aid or mutual protection:

Orice Storey	September 25, 1954
Elsie N. Dickerson	October 26, 1954
Gloria Pate	October 18, 1954

General Counsel's Exhibit No. 9—(Continued)

IV.

On or about October 15, 1954, the Respondent terminated the employment of the employees whose names appear in Appendix A, attached hereto and made a part hereof, in an attempt to prevent the Union from organizing the employees and to defeat the Union in an election scheduled to be held on October 19, 1954.

V.

On or about October 15, 1954, the Respondent terminated the employment of the employees whose names appear in Appendix B, attached hereto and made a part hereof, because each of said employees had, or the Respondent believed each of said employees had, joined or assisted the Union or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

VI.

The Respondent, by and through its officers, agents and representatives, whose names are set forth below and on or about the dates appearing hereafter, engaged in the following acts and conduct:

1. On or about September 24, 1954, and on five occasions between the beginning of August 1954 and October 19, 1954, the exact dates of which are unknown, General Manager Elmo Martini threatened and warned employees that the Respondent would close down its plant and cease operations if the employees joined or assisted the Union.

General Counsel's Exhibit No. 9—(Continued)

2. Between the end of July 1954, and October 19, 1954, the exact date being unknown, General Manager Elmo Martini warned and threatened employees that they would be deprived of employment benefits and would be required to work under less favorable conditions if they joined or assisted the Union.

3. In or about the latter part of September 1954, the exact date being unknown, General Manager Elmo Martini threatened an employee with physical assault unless said employee ceased his activities on behalf of the Union.

4. In or about the latter part of September 1954, the exact date being unknown, General Manager Elmo Martini vilified, disparaged, and expressed disapproval of the Union, and employees who joined or assisted the Union.

5. On or about October 25, 1954, General Manager Elmo Martini interrogated employees with respect to their interest in the Union and the manner in which they had voted in an election conducted by the Board.

6. In the latter part of September 1954, and on or about October 13, 1954, General Manager Elmo Martini warned and threatened that Union leaders and adherents of the Union would be discharged.

7. In or about the latter part of August 1954, the exact date being unknown, General Manager Elmo Martini promised employees benefits and privileges

General Counsel's Exhibit No. 9—(Continued)
of employment if they would refrain from joining
or assisting the Union.

8. On or about September 21 and 25, 1954, General Manager Elmo Martini imposed a rule forbidding solicitation, conversation, or activities concerning the Union on Company time or property, while representatives of the Respondent themselves engaged in solicitation, conversation or activities against the Union.

9. In the latter part of July or early part of August, 1954, Floorlady Edna Hardin warned and threatened employees with loss of employment or employment benefits if they joined or assisted the Union.

10. Between September 24, 1954 and October 19, 1954, the exact date being unknown, Floorlady Edna Hardin threatened and warned employees that they would be discharged if they joined or assisted the Union.

11. In about the middle of September 1954, and on three occasions thereafter between on or about October 1, 1954, and October 19, 1954, the exact dates of which are unknown, Superintendent Leonard Duckworth warned employees that the Respondent would close down its plant and cease operations if they joined or assisted the Union.

12. In or about the beginning of October 1954, the exact date being unknown, Superintendent Leonard Duckworth threatened and warned em-

General Counsel's Exhibit No. 9—(Continued)
ploys that their employment would be terminated unless they refrained from joining or assisting the Union.

13. On five occasions from the latter part of July 1954 to in or about the first week in December 1954, the exact dates being unknown, Floorlady Ella Herrerias warned employees that they would be deprived of employment benefits if they joined or assisted the Union.

14. In the latter part of August, the exact date of which is unknown, and on or about October 11, October 13, and October 18, 1954, Floorlady Ella Herrerias threatened and warned employees that the Respondent would terminate the employment of employees who joined or assisted the Union.

15. On or about October 1, 13, and 14, 1954, and on six occasions from in or about the middle of August 1954, to on or about October 19, 1954, the exact dates of which are unknown, Floorlady Ella Herrerias attempted to engage in, and did engage in, espionage and surveillance of Union meetings and of Union activities.

16. Between the beginning of August 1954 and October 19, 1954, the exact date being unknown, Floorlady Ella Herrerias threatened and warned employees that the Respondent had knowledge of the identity of employees who attended Union meetings or otherwise engaged in activities in its behalf, and that the employment of such employees would be terminated.

General Counsel's Exhibit No. 9—(Continued)

17. On or about October 15, 1954, and in or about December 1954, the exact date being unknown, Floorlady Ella Herrerias threatened and warned employees that if they joined or assisted the Union, the Respondent would make working conditions more difficult.

18. In or about the latter part of August 1954, the exact date of which is unknown, and on or about October 13, 1954, Floorlady Ella Herrerias sought to induce employees to engage in espionage and surveillance of Union meetings and activities by promising employees who would agree to do so with employment security and benefits.

19. On an unknown date between approximately August 1954, and October 19, 1954, Floorlady Ella Herrerias threatened and warned employees that the Respondent would close down the plant and cease operations if the employees joined or assisted the Union.

20. A few days before October 15, 1954, Floorlady Ella Herrerias warned and threatened employees that their names would be blacklisted by other employers if they joined or assisted the Union.

21. On or about October 14, 1954, Foreman William Maguire vilified, disparaged, ridiculed, and expressed disapproval of the Union.

22. Between October 9 and October 15, 1954, the exact date being unknown, Foreman Daniel

General Counsel's Exhibit No. 9—(Continued)
Schuster threatened and warned employees that the Respondent would close down the plant and cease operations if they joined or assisted the Union.

23. In or about the latter part of July 1954, the exact date being unknown, Superintendent Darrell Beavers warned and threatened employees that they would be blacklisted by other employers if they joined or assisted the Union.

24. In or about the latter part of July 1954, the exact date being unknown, Superintendent Darrell Beavers threatened and warned employees that the Respondent would terminate their employment if they joined or assisted the Union.

VII.

By the acts set forth in paragraphs III, IV, and V, above, and by each of said acts, the Respondent did discriminate, and is discriminating in regard to the hire, tenure, terms and conditions of employment of its employees, thereby discouraging membership in the Union, and did thereby engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

VIII.

By the acts set forth in paragraphs III, IV, V, and VI, above, and by each of said acts, the Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby en-

General Counsel's Exhibit No. 9—(Continued)
gage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IX.

The acts of the Respondent set forth in paragraphs III, IV, V, and VI, above, occurring in connection with the operations of the Respondent, described in paragraph I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead, and have led, to labor disputes, burdening and obstructing commerce and the free flow of commerce within the meaning of Section 8(a)(1) and (3) and Section 8(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director of the Twentieth Region, on this 13th day of June, 1955, issues this Complaint against Sebastopol Apple Growers Union, the Respondent herein.

[Seal] /s/ GERALD A. BROWN,

Regional Director, National Labor Relations Board,
Twentieth Region.

General Counsel's Exhibit No. 9—(Continued)

APPENDIX "A"

Sebastopol Apple Growers Union

20-CA-1035

Female Production Employees Laid Off 10/15/54

1. Albertoni, Ruth. 2. Allen, Marceline. 3. Ameral, Lina. 4. Ames, Nora. 5. Anderson, Caroline. 6. Angle, Marvel. 7. Antone, Bertha. 8. Antone, Eva. 9. *(Deleted in pencil.) 10. Awender, Karolina. 11. Azevedo, Virginia.

12. Baker, Bonnie. 13. Blair, Ethel. 14. Brickner, Bessie. 15. Bridges, Leona. 16. Bridges, Oma. 17. Brines, Zelma. 18. Brott, Virginia. 19. Brown-ing, Billie. 20. Buhrman, Nina. 21. Byrd, Margie.

22. Cithos, Mary. 23. Clark, Ruth. 24. Coate, Natalie. 25. Coats, Susie. 26. Coffey, Marie. 27. Collins, Marie. 28. Cooley, Elizabeth. 29. Crump, Gatha.

30. Dahl, Evelyn. 31. Davis, June. 32. Edwards, Helene. 33. Eilers, Myrtis. 34. Ellis, Mary. 35. Fenton, Violet. 36. Fletcher, Esther. 37. Floyd, Elsie. 38. Freyling, Marcia.

39. Gaither, Lula. 40. Garrison, Fannie. 41. Hall, Pastoria. 42. Hance, Anna. 43. Hansen, Hazel. 44. Hanson, Ruth. 45. Harrison, Lucille. 46. Hayden, Rose. 47. Herrall, Gail. 48. Hoffschneider, Elsie. 49. Hofland, Theresa. 50. Hontar, Ellen. 51. Hontar, Kathleen. 52. Hope, Laura. 53. Hydera, Marie.

General Counsel's Exhibit No. 9—(Continued)

54. Johnson, Irene. 55. Johnson, Leonor.
56. King, Dolores. 57. Kruse, Viola. 58. Layman,
Lila. 59. Lee, Eva. 60. Lindley, Beulah. 61. Lind-
say, Gloria.

62. McCarl, Edna. 63. McCarthy, Dora. 64. Mc-
Cullough. 65. McHugh, Elizabeth. 66. McPhee,
Eloyce. 67. Marguez, Mary. 68. Maw, Goldie.
69. May, Mary. 70. Mazzucchi, Nancy. 71. Miller,
Hazel. 72. Morien, Norma. 73. Mynock, Ada.

74. Napier, Renee. 75. Nelson, Irene. 76. Nunes,
Bernice. 77. Offut, Dorothy. 78. Patterson, Marian.
79. Perry, Catherine. 80. Peterson, Cylvia. 81. Pi-
rolle, Esther. 82. Pool, Lorraine.

83. Rearden, Darlene. 84. Roca, Pauline.
85. Ross, Aloa. 86. Row, Julia. 87. Rufino, Marga-
ret. 88. Runyon, Lillian. 89. Russell, Mary.

90. Scheffler, Marie. 91. Schrum, Evelyn.
92. Scott, Gertrude. 93. Scott, Merle. 94. Seidel,
Mary. 95. Schields, Viteria A. 96. Souza, Mathilda.
97. Sweningson, Amy.

98. Taber, Marion. 99. Tatum, Nancy.
100. Thornton, Lois. 101. Tripp, Marie. 102. Urton,
Etta. 103. Vernon, Amy. 104. Vessels, Stella.
105. Vogel, Anna. 106. Wasin, Edyth. 107. Wilder,
Louise. 108. Wilson, Edith,

109. Bates, Erma. 110. Smith, Jesse (Mrs.).
111. Browning, Doris.

Male Production Employees Laid Off 10/15/55

1. Allman, Lyman. 2. Augustin, Willy. 3. Bate,

General Counsel's Exhibit No. 9—(Continued)
 John. 4. Bertoni, Joe. 5. Breuer, Richard. 6. *(Deleted in ink.) 7. Burger, George. 8. Coffey, John.

9. Darden, David. 10. Davis, George. 11. DeVilbiss, Robert. 12. Duncan, Worthy. 13. Foster, William. 14. Fribourghouse, Ernest. 15. Gulledge, Alvin.

16. Heflin, Arthur. 17. Lee, Leonard. 18. McCall, Harry. 19. Marra, Alvin. 20. Mills, Lloyd. 21. Narron, Henry. 22. Neel, Fay.

23. Phillips, Richard. 24. Pozzi, Charles. 25. Rahm, Albert. 26. Reynolds, Richard. 27. Rogers, Gerald. 28. Smith, Joyce W. 29. Storey, Clarence. 30. Sweningson, Rudolph.

31. Unciano, Froilan. 32. Weare, William. 33. Kelleher, Gerald.

APPENDIX "B"

Women: 1. Allen, Marceline. 2. Ameral, Lina. 3. Ames, Nora. 4. Anderson, Caroline. 5. Antone, Eva. 6. Awender, Karolina. 7. Bridges, Leona. 8. Bridges, Oma. 9. Brines, Zelma.

10. Cihos, Mary. 11. Clark, Ruth. 12. Coate, Natalie. 13. Coffey, Marie. 14. Eilers, Myrtis. 15. Ellis, Mary. 16. Fenton, Violet. 17. Fletcher, Esther. 18. Garrison, Fannie.

19. Hall, Pastoria. 20. Hance, Anna. 21. Hansen, Hazel. 22. Hayden, Rose. 23. Hydera, Marie. 24. Johnson, Leonor. 25. Kruse, Viola. 26. Layman, Lila. 27. Lee, Eva. 28. Lindley, Beulah. 29. Lindsay, Gloria.

30. McCarl, Edna. 31. McPhee, Eloyce. 32. Marguez, Mary. 33. May, Mary. 34. Miller, Hazel.

General Counsel's Exhibit No. 9—(Continued)

35. Mynock, Ada. 36. Nelson, Irene. 37. Offut, Dorothy. 38. Pool, Lorraine. 39. Russell, Mary.

40. Scott, Gertrude. 41. Shields, Viteria A. 42. Tripp, Marie. 43. Urton, Etta. 44. Vernon, Amy. 45. Vogel, Anna. 46. Wasin, Edyth. 47. Wilder, Louise. 48. Bate, Erma.

Men: 1. Bate, John. 2. Coffey, John. 3. Fri-bourghouse, Ernest. 4. Lee, Leonard. Rahm, Albert. 6. Reynolds, Richard. 7. Storey, Clarence.

United States of America

Before the National Labor Relations Board

Division of Trial Examiners

Branch Office

San Francisco, California

Case No. 20-CA-1035

Sebastopol Apple Growers Union and General
Truck Drivers, Warehousemen and Helpers
Union, Local No. 980, AFL-CIO.

Case No. 20-RC-2637

Sebastopol Apple Growers Union, Employer, and
General Truck Drivers, Warehousemen and
Helpers Union, Local No. 980, I.B.T.C.W. &
H. of America, AFL-CIO, Petitioner.

INTERMEDIATE REPORT AND RECOM-
MENDED ORDER

David Karasick and Robert Magor, for the Gen-

eral Counsel. Tobriner, Lazarus, Brundage & Neyhart by Robert LeProhn, of San Francisco, Calif., for the Union. Severson, McCallum & Davis, by Nathan R. Berke, of San Francisco, Calif., and W. M. Caldwell, of San Francisco, Calif., for the Respondent.

Before: James R. Hemingway, Trial Examiner.

Statement of the Case

The complaint, in the case first above named, duly issued on June 13, 1955, alleges a violation by the Respondent, Sebastopol Apple Growers Union, of Sections 8 (a) (1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. The Respondent's answer, filed on June 28, 1955, denies the commission of such unfair labor practices. On July 14, 1955, the National Labor Relations Board, herein called the Board, ordered that a hearing be held on challenged ballots, report on challenged ballots, and exceptions thereto in the above-entitled representation case. By order of the Regional Director of the Board, Twentieth Region, the two cases were consolidated for hearing. As the Board did not direct that a report be issued in the representation case, I have not taken up the issues in that case except to the extent that they are required to be decided in the complaint case. It will be found, however, that most of the issues raised in the representation case are decided herein.

Pursuant to notice, a hearing was held before the undersigned, duly designated Trial Examiner at

Santa Rosa, California (with the exception of one day's hearing in San Francisco) commencing on July 19 and concluding on October 17, 1955. At the close of the hearing, the General Counsel argued orally. Time was set for the filing of briefs and the time was several times extended. On December 23, 1955, briefs were received from the General Counsel and the Respondent.

From my observation of the witnesses, and upon the entire record in the case, I make the following:

Findings of Fact

I. The business of the Respondent

The Respondent is a cooperative California corporation engaged in the business of packing, canning, and shipping apples and apple products. The Respondent's principal plant and offices are located at Molino Station, Sebastopol, California. During its fiscal year ending May 31, 1954, the Respondent purchased raw materials, supplies and equipment valued in excess of \$400,000. During the same period of time, the Respondent sold finished products valued in excess of \$1,000,000, of which amount approximately \$380,000 represented shipments made by the Respondent from its plant at Sebastopol, California, to places located outside the State of California.¹ No issue was raised on jurisdiction.

¹ Sales of canned goods in the period from June 1, 1954 through April 30, 1955, amounted to approximately \$1,480,000. In addition thereto the Respondent shipped about 5770 tons of fresh picked apples having a farm value of about \$380,000, and sent to

I find the Respondent to be engaged in commerce within the meaning of Section 2 (6) and (7) of the Act and I find that it will effectuate the policies of the Act to assert jurisdiction.

II. The labor organization involved

General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO² affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein called the Union, is a labor organization admitting to membership employees of the Respondent.

III. The unfair labor practices

A. The issues involved

The complaint, including amendments thereto made at the hearing, alleges numerous instances of interference, restraint, and coercion in violation of Section 8 (a) (1) of the Act. The violations of Section 8 (a) (3) stated in the complaint are alleged to consist of discrimination in the termination of employment of numerous employees. Three of such employees, Orice Storey, Gloria Pate, and Elsie Dickerson, are alleged to have been discharged on September 25, October 18, and October 26, respectively in the year 1954. But some 146 employees are

dryers about 866 tons having a value of about \$38,000. Presumably the same proportion of out-of-state shipments continued.

² The complaint was issued before the AFL-CIO merger. The name is herewith amended to show the designation of the new parent organization.

contended to have been laid off on October 15, 1954, in an attempt to prevent the Union from organizing the Respondent's employees and to defeat the Union in a Board conducted election held on October 19, 1954. This list includes both union and non-union employees. Those of this group who had indicated adherence to the Union are contended to have been discharged for the additional reason that they had, or the Respondent believed they had, joined or assisted the Union or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Respondent contends that the terminations of October 15 were made pursuant to normal seasonal practices. At the election of October 19, the Respondent challenged 100 ballots, most of which were cast by employees whose employment was terminated on October 15, 1954. Whether or not such ballots are to be counted will depend in large measure upon the resolution of the issue concerning discrimination under the alleged violation of Section 8 (a) (3) of the Act.

B. Background events and alleged interference, restraint and coercion

As all of the events related herein occurred during 1954, it will be understood that all dates herein referred to without year were in 1954 unless otherwise stated.

The Respondent's 1954 canning season opened on July 15 when the day shift began operating. The night shift started on July 20. On July 28, that year, Angelo Bertolucci, president of the Union and

Roy Rhodes, the Union's business manager and secretary-treasurer, went to the Respondent's office and asked to speak with Elmo Martini, who had become the Respondent's general manager the first of the year. Martini had known both of them for some time. Rhodes, according to Martini, had been business agent "at one of my former plants." He greeted them with "What the hell are you doing here, Roy and Ange?" Rhodes said that the Union had quite a few people signed up, that they wanted to be organized. Martini told them to come back in about 2 years. Rhodes asked if Martini would mind if he talked with the employees. Martini, who understood that Rhodes wanted to go into the plant to sign up employees, refused permission to do so but told Rhodes that he could do whatever he wanted to outside of the premises. Rhodes said that, as the Respondent was having a meeting of the board of directors that night, he would like Martini to bring the matter before that board to see what they thought about the Union's request to organize. Martini agreed to do so. Martini and the two union representatives then went to a nearby store for a cola drink where they engaged only in social conversation.

At the meeting of the board of directors that night, Martini reported the visit of Rhodes and Bertolucci. The minutes of the meeting record that "considerable discussion was held in this regard," but the minutes do not detail the discussion and none of those present who testified could remember the nature of it other than Martini's report of the

visit and questions which the directors asked of Martini about the visit. However, the minutes mentioned that "Briggs [director Ezra Briggs, who was also chairman of the board of directors of the Sebastopol Co-operative Cannery] suggested that the manager contact Mr. Jack Rossi * * * who was an expert on matters of this type to find out what favorable action we could take to discourage the AFL from causing any disturbance among our employees."

During, or for the week ending July 31 the Respondent raised its rates of pay over and above the usual 5-cent annual increase given at the opening of the plant. On about August 4, after Bertolucci was informed by employees of the wage increase, Rhodes telephoned Martini to learn the answer to his request to speak to the employees, and in the conversation Rhodes asked if Martini had given the employees a raise. Martini answered that he had. Martini gave conflicting testimony about the date when the Respondent decided to give the increase. It is clear that it was made effective for work performed in the week ending July 31, and checks in payment therefor would normally have been given to the employees on the Wednesday following the end of the week—i.e., on August 4, 1954. When originally asked about the date of the granting of the increase, Martini testified that the date when the increase was granted "was immediately after the checks were issued to the people" for the pay period ending July 24 and after some of the women on the night shift called his attention to the fact that they

had not received an increase. Checks for the pay period ending on July 24 would normally have been issued on Wednesday, July 28. At the time he gave this testimony, Martini testified that the payday was either Monday or Tuesday. In his later testimony he set the date of the grant of the increase as July 26 or 27, which would have been before, rather than after the pay checks were issued for the week ending July 24. In view of his earlier testimony and of the improbability that he would have given an unusual general increase without approval of the board of directors, I find that the increase was not given before the night shift received their pay checks on the night of July 28 for the preceding week. The result was an increase in rate from 85 to 95 cents an hour for the day shift and from 95 cents to \$1 an hour for the night shift. The complaint did not allege and so I do not find that the grant of this increase was an unfair labor practice. But timing of the increase in pay does indicate an attempt by the Respondent to eliminate one reason for the desire of its employees for union representation.

C. Interference, restraint, and coercion

The General Counsel adduced evidence of statements made by various supervisors of the Respondent, some tending to prove specific allegations of the complaint, some apparently to show knowledge by the Respondent of the identity of employees favoring the Union, and others evidently intended only to disclose a general attitude on the part of the Re-

spondent toward the Union. To the extent that the evidence performed any of such functions, I shall relate it, without separation, as nearly as possible in chronological order. However, only as specifically stated hereinafter do I find such statements to constitute interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act.

Gloria Pate had been employed by Respondent during a period extending from July 15 to October 18, 1954. During a few earlier seasons she had worked at another cannery, Manzana, under the supervision of Darrel Beavers. Beavers had become the Respondent's superintendent before Pate was hired there, but he left the Respondent's employ early in August 1954. Shortly before he left, he asked Pate to come to his office during her recess period. When she came, Beavers told her that he wanted to talk to her about the Union, that the Union was going to be starting up there soon, and that Pate was supposed to have had something to do with the Union at Manzana. He said he did not know or want to know if she had or not, that that was her business; but that "they asked me here if you had anything to do with the Union and I told them no * * * because I don't want you to lose your job and I know that you would lose your job if I had told them yes."³ Beavers went on to say that he thought she would be blackballed if she returned to Manzana "because of the Union before." He said he did not want her to tell him anything about

³ The quotation is from Pate's testimony. Beavers did not testify.

the Union but advised her not to get out in front and start anything when the Union came out there (to the Respondent's) because it would "be bad on" him and that Pate would get fired. He told her not to say anything to anyone and that he was telling her for her own good. Although the tenor of Beavers' remarks indicated an intention on his part to be personally neutral in the matter of the Union, he was, at the time, in a position authoritatively to express the views of the Respondent. His statement that Pate would be discharged if her connection with the Union were revealed to the Respondent or if she got out in front and started anything when the Union came out there would clearly have a coercive tendency, and I find that, by Beavers' statement, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. The meaning of Beavers' statement that Pate would be blackballed at Manzana is not entirely clear. The word "blackball" presumably could mean that the Respondent would notify Manzana of Pate's activity on behalf of the Union so that Manzana would not re-employ her. But it could mean merely that Manzana would refuse her employment because of her union connections even though the Respondent had no part in the blackball. Beavers did not expressly say that the Respondent would blackball Pate, and the expression "because of the Union before" suggests that he thought Manzana would deny her employment because of her union activities while she was still working at Manzana. She

testified that she had in fact been active in the Union at the latter place. In view of the quoted words, I deduce that the latter was Beavers' meaning. Although in the related conversation Beavers disclaimed knowledge of Pate's union activities at Manzana, there is reason to believe that he suspected, if he did not in fact know, that she had been active in the Union there. I find that Beavers did not threaten that the Respondent would blackball Pate but merely expressed his opinion of the attitude Manzana would adopt.

Orice Storey, whose discharge on September 25 will be hereinafter related, testified that when she was leaving work after the day shift on August 4 she saw Superintendent Leonard Duckworth (Beavers' successor) and Charles Williams, night foreman of the cannery, walking behind two men in a direction away from the plant toward the highway. The two men being followed, one of whom was Bertolucci, were passing out authorization cards and literature for the Union. She testified that when the two union men reached the highway, Duckworth and Williams came back and stopped at the car which her husband was driving and in which she and employee Marjory Byrd were riding, that Duckworth handed her two union application cards and said, "As you leave, hit that man [indicating one of the union representatives] with these," and that Williams said to her husband, Clarence Storey, who was also an employee, "As you leave do us a good turn and run over that man." Clarence Storey's testimony about the incident differed only

slightly. He testified that as he was driving out of the parking lot on August 4 he stopped the car when he came to the point where Williams and Duckworth were, that Duckworth handed his wife the two cards but that he did not hear Duckworth say anything. He testified, however, that Williams said to him, "Storey, do your country a good deed and run over that guy." Bertolucci testified that, the first time he was at the cannery to distribute literature, he was at the cannery door with two girls and a man when Williams came to him after about 10 minutes and said that they were on company property, that the company did not allow that (or did not like to have them doing that there) and to get back to the highway. Bertolucci testified that the union representatives then all went back on the highway. Duckworth and Williams denied the incident as related by the Storeys but made no reference to the incident related by Bertolucci. I find the incident to be substantially as testified by the two Storeys but find that the evidence is only illustrative of the attitude of the Respondent toward the Union and is not an unfair labor practice in itself.

According to Gloria Pate⁴ and Gloria Lindsay,⁵

⁴ When Pate testified, she went by her married name, Gloria DeFont. I have used her maiden name because in the testimony, exhibits, and Respondent's personnel records she was so called and it will avoid confusion to use that name throughout.

⁵ Pate and Lindsay were both on what was called the Union committee, the function of which was to promote interest in the Union. Edna Hardin, the 1954 day-shift floor lady testified that, when talk of

who were employed by the Respondent in 1954 before it reduced to a single shift, Martini was accustomed to stop at the spot where they were working to chat with them. Lindsay testified that another employee, Mary Castino, was present but did not participate in the conversations testified to. On one occasion, the date of which Lindsay fixed as just after they had received their union pledge cards,⁶ which would mean shortly after August 4, Martini asked them, according to Pate's testimony, which was similar to that of Lindsay, what they thought about the Union (Lindsay testified and Martini denied that he asked if they "were for the Union.") and they replied that they thought it was "a pretty good deal." Martini then, according to Pate, told them they did not know what they were getting into, that the Union was not as good as they thought it would be, that they might receive more money (i.e. higher wages) but that they would have to pay out so much (i.e. in dues and initiation fees) that it would not matter much one way or the other. He told them, according to both Lindsay and Pate,

the Union first started, she learned that Pate, Lindsay, and a third employee were agitators for the Union and so reported to Superintendent Duckworth.

⁶ Pate testified that Martini frequently spoke to them at their places of work after they had received their pledge cards but she was not so certain of the time of the conversation here related. Sometimes, according to Pate, Martini would tell them that their friends (referring to the union organizers) were outside and would ask what their friends had to say to them.

that each year the employees were given an increase of 5 cents an hour. Pate commented that "next year we'll be making a whole dollar an hour," and that Martini replied that "that's right * * * maybe even more" and that he told them to think it over. Martini denied having made the statements attributed to him by Lindsay but did not deny Pate's testimony of what he said. I find the conversation to be substantially as testified by Pate. Except for the opening question asked by Martini, his statements were permissible opinions and argument. The question, (what they thought about the Union) on its face, carried no implied threat. Except for subsequent events, it might be considered harmless. But Lindsay and Pate were among those whose employment was terminated in the layoff shortly before the Board-ordered election. Although, at the time he questioned them, Martini may have entertained no ulterior motive in asking Pate and Lindsay what they thought about the Union, the evidence hereinafter related of discrimination against known union advocates is such that all questioning of employees about the Union assumes the appearance of a composite effort by the Respondent to identify union advocates for discriminatory purposes. In view of this, Martini's questioning cannot be passed off as an isolated instance of interrogation.⁷ Accordingly, I find that by such questioning the Respondent interfered with, restrained, and coerced its employees

⁷ N.L.R.B. v. Syracuse Color Press, Inc., 209 F. 2d 596 (C. A. 2); N.L.R.B. v. Late Chevrolet Company, Inc., 211 F. 2d 653 (C. A. 8).

in the exercise of the rights guaranteed in Section 7 of the Act.

Lindsay testified to another conversation with Martini in September. Pate testified to substantially the same statements of Martini but at a different date. Since both girls testified to the presence of the other, I infer that they were testifying to the same occasion but were unable accurately to fix the date. Lindsay testified that, in the September conversation, Martini said that "if the plant would go Union that he'd close it down, that he'd lose too much money if it went Union, that he'd closed^s his plant here in Santa Rosa on account of the Union." Pate testified that Martini made the statement about closing the plant in the conversation about the annual wage increase as related above. She testified, "We asked him if he was going to close down the plant, and he said that he'd closed down his plant in Santa Rosa and he would do the same at Molino if we was to go Union." Martini denied saying anything to either Pate or Lindsay about closing down the plant if it went Union or saying that he would or had to close down in Santa Rosa. I am not satisfied that, in making

^s The reporter failed to hear the final letter and reported this word as "close," but, on cross-examination, Lindsay removed any doubt by quoting Martini as saying that he would close the apple plant "like he did close down his plant in Santa Rosa." Pate also used the words "he'd closed." The Trial Examiner heard the word as "closed" and, over objection of the Respondent, ordered the error in the transcript corrected.

his denial, Martini's memory was directed to the conversation that he actually had with the two girls. Before he was asked if he had made certain statements, he was first told by Respondent's counsel that Lindsay had testified that Martini made the statement in October, whereas in fact Lindsay had put it in September, and he was told by counsel that Lindsay had testified that he said "if the plant would go Union you would lose too much money and *you would close down in Santa Rosa.*" (italics supplied.) That was not quite the same as saying that he had closed the plant in Santa Rosa as both Lindsay and Pate quoted him as saying, and as the transcript of Lindsay's testimony on cross-examination shows. Although Martini's denial may (in his own mind) have been intended to go to the incident as such rather than to Lindsay's account thereof, this is not the form of his testimony, and he did not deny Pate's testimony of the statement. Martini had been connected with other plants than that of the Respondent—plants located in and about Santa Rosa, among them one plant in Santa Rosa which was "union" and which had closed down in 1951 or 1952. I believe that Martini did make the statement approximately as Lindsay and Pate testified. Although, as quoted by Lindsay, Martini said that he would lose too much money if the plant went union and that he would close down, his statement as made is not the equivalent of saying that if operation of the plant became unprofitable (after the Union became the representative of the employees) he would close it down. As made, his statement as-

sumes as a foregone conclusion that the plant could not profitably be operated if the Union became the employees' bargaining representative and therefore he was saying that he would close down as soon as the representative status of the Union was certified—not after attempting to operate at a profit following such certification. In effect, therefore, the statement about closing the plant was coercive and I find that by it the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Mary Russell, an employee of the Respondent in 1954, testified that in August or early September, near the benches outside the women's lounge in the plant, Ella Herrerias, the night floorlady, and concededly a supervisor, in the presence of a group of employees, said that if any of them talked union or signed pledge cards they would immediately lose their jobs; also, that if any of them attended union meetings there would be someone there from the company who would come back with their names, which would get to Martini, and that they would lose their jobs. Herrerias denied having made this statement and denied having spoken with Russell at all. There was nothing in Russell's testimony to indicate that Herrerias' statement was directed to her individually. In evaluating the denials of Herrerias, I have taken into account her demeanor on the witness stand, her evasiveness at critical points on cross-examination, conflicts in her own testimony, and her apparent disposition to mislead, as well as the testimony of numerous witnesses which amply

portrays Herrerias as committed to a course of opposition to the Union.⁹ Russell, on the other hand, impressed me as an honest witness. Although in some instances I have questioned the accuracy of her memory of exact words quoted by her as used by supervisors, I credit her testimony as to the substance of what Herrerias said, and I find that it constituted interference, restraint, and coercion by the Respondent in violation of Section 8(a)(1) of the Act.

Eva Lee, also an employee in 1954, quoted Herrerias as making similar statements at about the same period of time, at about 4 p.m., one day outside the woman's lounge near the time clock. According to Lee, Herrerias said, in the presence of a group of women who were talking about the Union, "Don't get my girls all excited about the Union because * * * if you do * * * you are going to get blackballed from every job around here." Lee also quoted Herrerias as telling employees that they would be laid off if they did not quit talking about the Union. A few days later, in the women's rest room at the time of change of shift, according to Lee, the women were talking about the Union,

⁹ Edna Hardin, day shift floorlady in 1954, testified that Herrerias told her in September 1954 that she (Herrerias) had just got rid of three agitators, which Hardin took to mean (correctly, I find) union agitators. Hardin was not employed by the Respondent at the time of the hearing. From Hardin's testimony and all the evidence, I judge Hardin to be not favorable toward the Union but inclined to be neutral.

and Herrerias said, "If you girls think I am tough now, wait; if the Union gets in, I'll show you how tough I can be."¹⁰ I find that Herrerias made such statements substantially as quoted by Lee and find that by such statements the Respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act.

Eloyce Mounger, nee McPhee, testified that early in September 1954 (while she was employed at the Respondent's) she went to Martini, apparently on the plant grounds, and told him that she was going to be married in October but was returning to school and wanted to work part-time, after school hours. According to Mounger's testimony, Martini asked her if she was "getting a fair deal working," that she said, "yes," and that he then said, "You know that if the union gets in that you can't work part-time under the union, you could work only full-time" and "then he said that the unions had tried to get in a couple of years before but hadn't succeeded, and if he could keep them out—or keep them from getting in this year, they couldn't try again for five years, and he said that under the union the conditions in the cannery would be more strict." He then told her to see the floorlady about part-time work. Martini denied that there was such a conversation with Mounger. I believe and find that

¹⁰ Lee gave slightly different wording, in quoting Herrerias, on direct and cross-examination, without changing the substance of Herrerias' statement. The quotation above is taken from her testimony on cross-examination.

Mounger, then McPhee, did speak to Martini concerning part-time work as she testified. I also find that Martini made some reference to working conditions in a plant where a union was a bargaining representative, but I am not convinced that Mounger quoted him accurately. Her testimony sounds like a garbled version of what Martini may have said. Martini may have mentioned the effect of the one year rule, i.e. Section 9 (c) (3) of the Act, on the Union's efforts to win recognition, but I deem it improbable that Martini said that if the Union did not get in that year it could not try again for 5 years. I find that Mounger's accuracy is questionable in several respects. Because of the doubt raised concerning such parts of her testimony, I am deterred from finding that Martini made the specific statement about keeping the Union from getting in that year, although it appears more probable that he said that than that he said that the Union could not try again for 5 years.

In the latter part of September, Martini handed Lindsay and Pate a newspaper clipping concerning financial difficulties or irregularities of a local of the same international union as that with which the Union here was affiliated. He asked, "Now, what do you think of the Union?" Then asked them to show the clipping to the officials of the Union and let him know what they said about it. Later he returned to Lindsay to learn their response. I find no unfair labor practices in this incident.

Also in the month of September 1954, during a

morning break (rest period), a group of women employees, which included Russell, heretofore mentioned, and Lila Layman, were standing in the doorway of the plant. One of the women asked Martini, who was there, why "he wouldn't go union." Russell and Layman quoted Martini's answer to this question but they differed slightly as to his words. According to Layman's testimony Martini answered "that he would close the plant down rather than to see it go union, because he couldn't afford to pay union wages." Russell testified that Martini said "that he would shut the plant down definitely before going union, and he said 'I would not pay union wages.'" Martini testified that he did not recall such an incident as related by Russell and that he did not make such a statement as counsel indicated Russell had testified about. He was not asked about Layman's testimony concerning the incident. I find that such an incident did occur and that Martini made a statement substantially as quoted by Layman. But even the difference in meaning imparted by the use of "could" as quoted by Layman in the phrase "couldn't afford to pay union wages" instead of "would" as quoted by Russell ("wouldn't pay union wages") does not prevent the statement from carrying a threat. In fact, as in Martini's statement to Pate and Lindsay, it indicated an intention to close the plant without awaiting the results of negotiations on wages, in the event that the Union should be designated bargaining agent by a majority of the employees. I find, therefore, that by such threat the Respondent interfered with, restrained, and coerced its employees in the

exercise of the rights guaranteed in Section 7 of the Act.

At lunch time on Wednesday, September 22, 1954, while employees were sitting in their cars on the Respondent's parking lot, Grami and other union representatives were on the highway with a sound truck. Over the loud speaker, the latter urged the employees to get a committee of six or seven employees together and ask Martini if he would meet with union representatives with respect to the holding of an immediate election.¹¹ Orice Storey, Lila Layman, and Mary Russell, who were on the Union's organizing committee, stopped along the way and got some other women to go in with them to present the request to Martini. Learning that Martini was then in the office in the cannery (the main office being in a separate building), Layman went up the steps to the balcony where the office was located and knocked on the door. Superintendent Duckworth came and told Layman that Martini was busy. She went back downstairs and waited with the group of women. The time came for them to punch the time clock and return to their stations. Floorlady Hardin asked why they did not punch in, and they told her they were waiting to speak with Martini. Hardin went up and told Martini that Mrs. Storey wanted to speak with him. In a little while he came down to where the

¹¹ The petition for certification had been filed on August 17 and the representation hearing had been held on September 19. The decision of the Board was being awaited when the incident here described took place.

group of women, variously estimated by the witnesses as between 25 and 75, were standing. Storey and Layman asked Martini to meet with the union representative in regard to an immediate election. Martini said definitely that he would not, that since the matter was in the hands of the Board he had nothing to talk with them about, that the Board would soon render a decision. Thereupon the women returned to work. Storey's time card for that date shows that she punched the clock at 12:02 p.m. She was supposed to be at her post at 12.

At about 3:30 p.m. the same day, September 22, 1954, Superintendent Duckworth went to Layman and Storey as they were working and told them that Martini wanted to speak with them in the office. They went there and Martini said he knew Storey and was getting to know Layman, that he had watched Storey and knew her to be a good worker, that he was disappointed in her and did not think she would be taken in by "those union guys."¹² Martini asked Storey why she was doing it." Storey answered, "For money," and asked if he thought 95 cents an hour was adequate pay for what they were doing. There followed a lengthy talk in which Martini presented arguments against the Union and advised them to think the matter over carefully before they got involved in something that would not do themselves or anyone else any good. According to Martini, he told them that he admired the

¹² The findings here made are taken partly from the testimony of Orice Storey, partly from that of Layman, and partly from that of Martini.

way they fought for what they thought was right "but [asked] if they wouldn't do me a favor and cease from having conversations of that type in the building proper where it would disrupt my employees and affect the production of the plant." Storey quoted Martini as saying that he had talked to her husband that day and told him "that I will not have you talking up this union thing on cannery property."¹³ Layman testified that Martini told them they could talk union on their own time. I deduce from the testimony of the three that Martini did not object to their talking about the Union on the parking lot but that he was prohibiting such talk within the cannery building. Except for facts hereinafter related, it might be supposed that Martini was thinking of limiting his admonition to refraining from union talk while at work in the cannery or while persons to whom they might be speaking were at work, but in view of the circumstances surrounding the discharge of Orice Storey, hereinafter related, I find that Martini spoke literally when he warned them not to talk union in the building proper even if they might be speaking to someone who was not working. However, there is no evidence that a rule had been promulgated for all employees that they should not engage in talk about the Union in the cannery even while they were working. Floorlady Hardin testified that she had changed the work station of one girl who com-

¹³ It is not unlikely that Storey understood this to be the word used, whereas Martini actually said "proper" rather than "property."

plained to her that certain women were always trying to get her to join the Union, but Hardin apparently did not punish those who had done the soliciting, although it was presumably done while they were working. Martini did not finish speaking to Storey and Layman on September 22 until about 4:20 p.m., 20 minutes after the end of their shift, and they were paid overtime therefore. As the women employees had rest periods during their working hours and as they would then have time of their own to speak with anyone else who was not working, a prohibition against talking about the Union in the cannery building, even if promulgated as a general rule, would have limited their right to carry on discussions that would in no way interfere with their work or that of others,^{13a} and as Martini applied such prohibition only to certain employees, I conclude that the prohibition constituted an unwarranted limitation on their freedom of speech, and constituted interference, restraint and coercion of the Respondent's employees in the exercise of the rights guaranteed to the employees in Section 7 of the Act.

According to Clarence Storey, he had been summoned to the cannery office by Manager Martini on the same day, just before the noon incident above related.¹⁴ In the office, Martini said to Storey, as

^{13a} Williamson-Dickie Manufacturing Company, 115 NLRB No. 62.

¹⁴Storey testified that he was supposed to punch the time clock at 11:45 a.m., after his lunch time and that he was just about to do so when Superintendent Duckworth interrupted and took him to the office. He testified that he was pretty sure he

quoted by the latter, "I understand you're going for the Union." Storey said he was. Martini asked if he knew what he was getting into. Storey said that he wanted more pay and Martin told him he would not get as much money as he was then, that the women would get only 90 cents an hour,¹⁵ and that he (Storey) would be assessed for accidents that happened as far east as New York. Martini told Storey that he did not want him talking union on company time but that he could do as he pleased on his own time.

Ernestine Hack and Erma Bate, who had worked near each other in 1954, testified to incidents involv-

had not punched in until after he came down, at which time he saw his wife and the other women at the bottom of the stairs. His time card for that date bore the after-lunch punch-in time of 11:40 a.m. I do not deem this discrepancy of great importance, although it would have placed some of the blame for late starting that noon on Martini, if he had been closeted with Clarence Storey that day, because Storey was the one to start the machinery and the flow of apples in the flume before the women could do their work. Except for the time card evidence, the fact that Martini spoke to Clarence Storey in the cannery office, in Duckworth's presence, as testified by Storey, was not disputed. It is probable that Storey had finished punching in when Duckworth told him that Martini wanted to speak to him.

¹⁵ I do not construe this to be a threat unilaterally to reduce pay if the Union became the bargaining agent. It was based rather on Martini's understanding of union rates. Orice Storey quoted Martini as saying that the Union had just signed a contract at Watsonville, a town about 150 miles south of Santa Rosa, calling for 90 cents an hour pay.

ing Floorlady Herrerias, but their memories of the time when they occurred sometimes differed. Although both Hack and Bate had signed union authorization cards, there is no evidence that Herrerias knew this, at least not before Bate gave Herrerias a list of union members, as hereinafter related, and I deduce from all the evidence that Herrerias had cause for believing that Bate and Hack were not union minded. Between October 5 and 10, according to Bate's testimony, Herrerias said to Bate, within the hearing of Hack, "If this place goes Union, we are going to close it down, already six weeks of apples went to the co-op cannery [Sebastopol Co-operative Cannery] on account of the Union." Herrerias denied having made the quoted statement. Hack quoted Herrerias as saying that "we lost six weeks of apples to the co-op and if the place went union we'd close down." I believe that Bate inferred from what Herrerias said that the transfer of apples to the co-op was on account of the Union and that Herrerias did not say so in so many words, but otherwise I credit Bate's testimony and I find that Herrerias made a statement substantially as quoted by Hack and Bate and I find that thereby the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

Bate testified that a few days before the layoff, which occurred on October 15, 1954, Herrerias told her in Hack's presence that she was making up a list and that those who would "stick" with her would be assured of a job, whereas otherwise they would

be blackballed "from here down south." Hack testified to a similar statement by Herrerias but fixed the time as about mid-September. According to Hack, who testified that Bate was present, Herrerias said that anyone that joined the Union would be blackballed all the way down the line and further said that there would be some weeding out done. I believe and find that the testimony of Bate and Hack referred to the same incident, that it occurred in October 1954, and that Herrerias made the statements, in substance, as testified by Bate and Hack. By such statements of Herrerias, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The evidence indicates that many of the union advocates among the employees were known to the Respondent's supervisors before October 14, 1955. Evidence was adduced by the General Counsel tending to establish that Herrerias enlisted the assistance of certain employees in ascertaining the identity of those employees who favored the Union. Bate testified that, on about October 8, Herrerias came to where she was working as a sorter and asked her to go upon the slicer to see what she could find out about the Union. Bate shook her head. Herrerias denied that she asked Bate to work on the slicer to find out about the Union. Hack testified about this incident saying that about mid-September Herrerias asked Bate to go up on the slicer as relief and Bate went; that, about 2 weeks later Herrerias again asked Bate to go up on the slicer and Bate

shook her head, "No." Two explanations of the difference in testimony suggest themselves—either Hack did not hear as well as Bate or Bate inferred that Herrerias wanted her to go to the slicer for the purpose she testified to. I am inclined to the latter explanation, because if Hack were close enough to hear part of what Herrerias said, I would suppose that she could have heard everything that was said. I base no finding of unfair labor practice on this incident.

An instance of Herrerias' interest in the identity of pro-union employees was related by Pauline Ploxa. Ploxa had, before September 10, 1954, been employed by the Sebastopol Co-operative Cannery, hereinafter called the Co-op, before it laid off some of its employees about that date. On September 13, Ploxa and her friend, Dora Rawles, were employed by the Respondent. Because Herrerias either flatly contradicted Ploxa or gave a different version of the incidents to which Ploxa testified, I shall relate both versions of such incidents before resolving the conflict. Ploxa testified that about 2 or 3 weeks after she was hired (which would fix the time as between September 27 and October 4, she telephoned Herrerias and asked if there was going to be any trouble at the cannery "between the workers and the cannery or the Union." It is not clear why Ploxa thought there might be trouble at that particular time unless it was because of the discharge, on September 25, of Orice Storey, an outstanding union advocate.¹⁶ Ploxa testified that she

¹⁶ Storey's discharge will be related hereinafter.

asked Herrerias if it was safe for her and Rawles to come to work and spoke about "the picket line,"¹⁷ and that Herrerias replied, "Don't be afraid, Martini is going to get the sheriff from Santa Rosa and have everything under control," and then added, "It will be best for you girls to keep away from the Union meeting, because Mr. Martini is going to shut the place down if you go to those meetings." On Tuesday night, October 12, 1954, according to Ploxa, who speaks Spanish as well as English, Herrerias came to where she was working and spoke to Ploxa in Spanish, saying, "Pauline, will you go to the union meeting for me as a friend, and because we both speak Spanish, and tell me who from here will be there?" Ploxa testified that she asked Herrerias, "Why, what are you going to do if I tell you?" and that Herrerias answered, "I want to get their names at least, and give them to Mr. Martini so he can fire them." Ploxa testified that she told Herrerias that she did not know the names of all the women and that Herrerias said Ploxa should go and take notice of the ones who were at the meeting and then come back and point them out to Herrerias. Ploxa went to the union meeting on the afternoon of October 13. At the plant that night, she testified, Herrerias came to her and told her, in Spanish, to go to the bathroom. After first

Other events during the period of time set by Ploxa include: September 19, the Board hearing in the representation case; October 4, the Board's decision and direction of election.

¹⁷ There was no evidence that picket line had been established or was even contemplated.

protesting, according to Ploxa, she went there and Herrerias came and asked her who was at the union meeting. When Ploxa testified that she did not know the women, Herrerias opened the door and told Ploxa to point out the women that she saw. Ploxa pointed to Clara Davello as one who had been at the meeting. Herrerias said, "Oh, I don't worry about her, she hates the Union." Ploxa testified that a woman named Mary Chapita¹⁸ walked by and that she told Herrerias that that woman was at the meeting and that Herrerias replied that that was all she wanted to know. Ploxa testified that she then told Herrerias that a union man would be at the plant the next day to give out "the buttons" and that Herrerias patted Ploxa and said, "For that, you will have a job with the company."

Herrerias admitted that she sometimes spoke Spanish with Ploxa and admitted having had conversations with Ploxa but of somewhat different content. With respect to the telephone conversation to which Ploxa testified, Herrerias testified that Ploxa had called her to say that she and Rawles would not be at work and that when she thanked Ploxa and started to hang up, Ploxa said, "I have something I want to tell you," and that Ploxa then proceeded to tell Herrerias about Mary

¹⁸ This is the spelling of the official reporter. It sounded like "Chiquita" to me and also apparently to Respondent's counsel because he used that spelling and pronunciation later in questioning Herrerias. (Tr. p. 3409) If this is correct, Ploxa may have been using it as a nickname, as it is Spanish for "little girl."

Seidel, an employee of the Respondent who had come from the Co-op, saying that she was a troublemaker. Herrerias testified that she told Ploxa that she did not know who Seidel was and that Ploxa then described her and told Herrerias that Seidel was "very strong union" and to be careful of her. Herrerias testified that she replied that she was not interested, that the woman was doing her work and that as long as she was doing her work it did not make any difference to her.¹⁹ She denied that she had told Ploxa that it was best to keep away from union meetings.²⁰ With respect to the other incident to which Ploxa testified, Herrerias testified that on October 12 while she was making her rounds, Ploxa was sitting at the slicing machine staring off into space, that she asked Ploxa "What is new?" or "What is on your mind?" and that Ploxa said there was a [union] meeting the next day and she did not know whether or not she should go. Herrerias testified that she asked Ploxa "Why not?" and that Ploxa then said, "Well, I don't know. On second thought I believe I will go. I

¹⁹Seidel was laid off when the night shift was terminated on October 15. Ploxa was scheduled to be retained but told Martini that she could not work days. Ploxa had signed a union pledge card on September 3 while she was still working at the Co-op. There is no evidence that Seidel had ever signed one. Also there is no evidence that Herrerias knew that Ploxa had signed one at the Co-op. If Herrerias made the reply, as testified by her, I find that it was intended to mislead and that Herrerias was not, in fact, disinterested.

²⁰I do not believe that Herrerias made this statement in manner and form as testified by Ploxa.

will see who is there and I will let you know.” Herrerias testified that she told Ploxa she was not interested.²¹ The next day or so, according to Herrerias, she stopped to speak with Ploxa and asked, “What is new?” Ploxa replied in Spanish, “Don’t say anything because I don’t want Mrs. Rawles to understand.” Herrerias testified that she told Ploxa, “I don’t know what you are talking about,” and that that was all, that she did not tell Ploxa to go to the ladies’ room, that she never spoke to Ploxa off the platform, and that she did not know any Mary Chapita.²²

Before making resolutions of credibility, two fur-

²¹ In Herrerias’ affidavit executed on February 9, 1954, appears the following: “Ploxa and I are both Spanish, from the same home town, and we spoke in Spanish together. I recall that one afternoon she was kind of quiet and I asked her, ‘What’s on your mind?’ Ploxa said, ‘There is a union meeting tomorrow and I don’t know whether to go to it or not.’ I asked her why didn’t she go, and she said maybe she would. Ploxa said, ‘I’ll let you know who is there.’ I said that if she wanted to tell me anything it would be all right.”

²² Herrerias’ affidavit reads: “So then, either the day of the meeting or the day after, I stopped where Ploxa was working and I asked, ‘What’s new?’ I don’t recall her answer, but it was not much. Then I said, ‘Was there a big crowd?’ or something like that. Ploxa switched to Spanish and said, ‘I don’t want the girl next to me (meaning Dora Rawles) to know what we are talking about.’ But Ploxa didn’t volunteer any information then, and I didn’t ask for any. We did go off in a discussion, but not about anything in particular. I asked Ploxa who was at the meeting, but she didn’t tell me and I didn’t press her.”

ther incidents mentioned by Ploxa will be related. Ploxa testified that on October 14 as she was coming to the plant for the night shift, Bill Grami, the Union's organizer, was handing out union buttons, that she got one but put it in her pocket and did not wear it, that, when she got to her station, Herrerias asked her and Rawles where their buttons were, and that they replied that they were in their pockets. She testified that Herrerias turned and went to the office, which was on a balcony, that Mrs. Herrerias stood on the balcony with a pad of paper and a pencil in her hand next to a laboratory employee, Mary McGuire, looking down at the women—"looking at them and writing." The suggested inference to be drawn from this testimony apparently is that Herrerias was writing down the names of employees who were wearing union buttons. Dora Rawles corroborated Ploxa's testimony that Herrerias questioned them about where their buttons were. Herrerias denied both the questioning and Ploxa's testimony of her making notes on the balcony.

A resolution of credibility as between Ploxa and Herrerias is not without difficulties because I have reason to believe that, although there was a factual foundation for Ploxa's testimony, Ploxa may have changed or embellished the facts in some of the incidents for personal reasons of her own. For example, on October 13, no employee named Mary Chapiata or Chiquita was listed on the payroll.²³ Mary

²³ Ploxa's demeanor on the witness stand gave me the impression that she mentally groped for a name

Seidel was listed. If Ploxa did tell Herrerias that Seidel was "very strong union," the information appears to have been false so far as the evidence shows. No evidence was adduced by the General Counsel to identify Chapita or Chiquita as an employee or to prove that Seidel, if she was the same as Chapita or Chiquita, was ever interested in the Union. The evidence creates an impression that Ploxa was playing both ends against the middle—that she was trying to appear to the union side to be pro-union and as not giving away union secrets but at the same time trying to make Herrerias believe she was siding against the Union. Herrerias was not always frank in her testimony and much of her testimony I do not credit. But on the other hand, certain portions of her testimony appear to be sufficiently probable as to be credible, at least in essence, if not detail, especially since they are in some respects similar to the account given in Herrerias' affidavit. From my observation of the witnesses and my analysis of the testimony and of all the evidence, I conclude that part of the testimony of each witness was true and I make the following findings: Ploxa, early in October, sought to give Herrerias the impression that she was not union minded by intimating in the telephone conversation she had with Herrerias at about that time that she was afraid of violence, probably from union activ-

before she came up with "Chapita" or "Chiquita." I conclude that she either failed to remember the name of a real employee or fabricated the name to avoid using Seidel's name, and I am inclined to believe it was the latter.

ity (although she reversed it in her testimony), and by warning Herrerias about Seidel. If Herrerias ever expressed disinterest, I find that it was feigned. Thereafter, Ploxa gave Herrerias the opportunity to suggest that she attend the union meeting of October 13 to identify employees who were at that meeting. I also find that Herrerias did, on October 14, ask Ploxa whom she had seen at the meeting and that Ploxa identified Clara Davello among others. The evidence indicates that Herrerias was friendly toward Davello. Although Davello had signed a union pledge card, there is some reason to infer that she was thought by the Union not to be a strong adherent. I find that Herrerias did respond to Ploxa's identification of Davello as Ploxa testified, although I am not satisfied that the incident took place in the ladies' room, or, if it did, that Herrerias was the one to suggest that as a place from which to identify those who had been at the union meeting. But regardless of doubts regarding details, I am satisfied and find that Herrerias was not disinterested in the matter of union connections of employees; rather, she was quite receptive to information along that line. I find that her conversation with Ploxa on October 14 was not as limited as she would have it believed. I draw no inference with respect to the incident Ploxa testified about when Herrerias was on the balcony, even if it occurred.²⁴ An inference that Herrerias was writing

²⁴ If there was such an incident, I believe that Ploxa was mistaken about the identity of the woman who was with Herrerias on the balcony.

down names of employees who were wearing union buttons is not warranted by the evidence. Even if Herrerias had been writing names of employees at that time and place, she might have innocently required assistance with names of employees whom she knew only by appearance. The evidence discloses that only 25 of 92 women on the night-shift payroll had signed union pledge cards,²⁵ and apparently few on that shift wore union buttons on October 14. Herrerias admitted to having seen but two, both by women who were among those laid off on October 15, although she testified that the layoff list had already been made up before she saw those women wearing buttons. The sum of the evidence convinces me that Herrerias learned the identity of many of the union-minded employees, but I doubt that she received much assistance from seeing union buttons on night-shift employees.

Rawles confirmed Ploxa's testimony respecting Herrerias' question about their union buttons. I believe it possible, however, that Ploxa and Rawles may have misconstrued the meaning of Herrerias' query. On the night of October 13, Ploxa had told Herrerias that a man from the Union would be passing out buttons, intimating that Herrerias could thereby learn the identity of union members. When few union buttons appeared on the night shift on October 14, a question, "Where are your union buttons?" could be interpreted to mean, "Where are all the buttons you said I would see?"

²⁵ Of the 25, several had signed only at places of former employment.

Since Ploxa had given Herrerias reason to believe that she and Rawles were not pro-union, it is improbable that Herrerias would have been expecting them to be wearing buttons themselves. In view of the doubt in meaning, I do not find that Herrerias asked the question with reference to personal union buttons of Ploxa and Rawles.

Marie Tripp testified that at 7 p.m. on October 19, after the election, she encountered Martini at a place called Molino Corners, a filling station, and that Martini had asked her how she had voted in the election and if the election suited her. Martini denied that he had asked the first question but admitted asking the second one. No testimony was given as to how the conversation started and there is nothing in the testimony of either Martini or Tripp to fortify the testimony of one or the other. It appeared to me that each of the two witnesses was testifying about the incident according to what he believed to be the truth. For all that appears from Tripp's testimony, "How did you vote?" were Martini's first words to her, as Tripp understood them, without any greeting or preliminary statements. But if that were the case, it might easily be that Tripp misunderstood the first word and that Martini actually may have said, "Hi"! or "Hello" followed by "Did you vote?" There was no showing that Martini had knowledge that Tripp had in fact voted and it does not seem probable that, without knowing that she had, he would ask her how she had voted. Martini gave a fuller account of the conversation than did Tripp except that he did not testify

whether or not Tripp replied to his question of whether or not the election returns suited her. Tripp told Martini that she had been laid off and needed the work. He took her address and telephone number and turned it in to the office. He told Tripp, he testified, that undoubtedly someone would leave before the end of the season and she could get back on. Tripp quoted Martini as saying, "Give me your name and 'phone number and we'll give you a call in a few days to come back to work." She never got the call. Consistent with my previous finding, I find that whether or not Tripp be deemed an employee or merely an applicant for employment, by Martini's questions as to how the election returns suited her, a question in form designed to learn Tripp's attitude toward the Union, the Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

Lila Layman and Mary Russell, two of the employees who had been on the union committee and who had been laid off by the Respondent on October 15, returned to the Respondent's plant and spoke with Martini in the warehouse one morning sometime between October 26 and November 3, 1954. They told him they were looking for work and asked if he needed help. He told them that he did not need any help but that they should leave their names and if someone left they could replace them. Martini took their names and turned them in to the office. Both Russell and Layman testified that Martini said that those who had been laid off would be

called back if there was a vacancy. According to Russell, Martini said they would be recalled before putting on new help. According to Layman he said they would be recalled in order of seniority. Martini did not specifically deny this, but may be presumed to have denied it as he made a blanket denial and gave his own account of the conversation, which did not include that part. It is not logical that Martini would say that the employees laid off would be recalled either in order of seniority or before new employees and yet would still tell them to turn in their own names for employment; for if the Respondent were going to rehire laid-off employees in order of seniority or before new employees, it would not need to take Russell's or Layman's name, for theirs would come up with all the rest. I infer that, if Martini made reference to any order or sequence of re-employment, his remarks were confined to those who had specifically asked for work and left their names.

Both Russell and Layman quoted Martini as making comments, in the same conversation, about unions which Martini denied. Their testimony was, in substance, that Martini said that unions were no good in canneries but were all right in big industries like the automobile industry. Since such a statement would be a privileged statement of opinion, it is unnecessary to decide whether or not Martini said it. Both Layman and Russell quoted Martini as making a statement of reproof about their union connections. As put by Russell, Martini said that they both "should have thought it over

seriously before jumping into this union deal." Layman testified that Martini "told me that I should have thought it over before I got myself involved in something I would have been sorry for." I find that Martini made some such statement, indicating knowledge of their union advocacy and reproof thereof. I am not persuaded, however, that Martini made the statement as a threat since it was not connected with any statement indicating that that was the reason for not re-employing them and the evidence does not establish that a vacancy actually existed at that moment.

D. Evidence of Respondent's identification of union advocates

As will be related hereinafter, the Respondent terminated its night shift and laid off a substantial number of employees from both day and night shifts on October 15. According to Respondent's supervisors, a meeting to select employees for the purpose of retention after October 15 was held on the afternoon of October 14. At this time, if the Respondent had been so disposed, it could have identified day shift union supporters from their union buttons, as a majority on that shift were wearing them that day.

Erma Bate, previously mentioned, testified that she attended the union meeting which was held at the union hall on October 13 and that after that meeting she took from a desk, behind which Grami had been sitting during the meeting, a typed list of names and addresses of employees of the Respond-

ent who had signed union pledge cards. (Grami testified that usually five such lists were made up at a time.) This list, Bate testified, she put in her purse and later put it in the glove compartment of her car; then she went home and left the union button she had received at the meeting before she went to work. On October 14, at about 8:30 p.m., according to Bate, Herrerias came to her and asked what was new and if she had heard anything. Bate testified that she told Herrerias that she had something for her, and that Herrerias said, "Good." Bate further testified that she went to her car and got the list of names (which for purposes of identification will hereafter be referred to as the purloined list), returned, and gave it to Herrerias, no one else being present. Herrerias replied, according to Bate, "Thanks very much. I can't tell you how much I appreciate this, and Mr. Martini."

Herrerias admitted that she had had possession of the purloined list and that she had turned it over to Superintendent Duckworth, but she testified that she did not receive it until October 16, the day after the layoff, when Bate, unsolicited and uninvited, brought it to her home. She further testified that she delivered it to Duckworth that Saturday night. It is undisputed that Duckworth retained the list until the following Tuesday, October 19, the day of the Board-conducted election, and that he then told Herrerias it was on the desk in his office and that she could take it back.

Bate testified that she was at Herrerias' house on October 16, but her account of how she hap-

pened to be there and of what happened after she got there differs from that of Herrerias. In order to understand Bate's explanation it is necessary to go back to the afternoon of Friday, October 15, when the layoff was announced in the warehouse shortly after 4 o'clock. According to Bate, she left the plant in a huff that evening after the warehouse meeting, not waiting to finish the night shift, because, when the retention list was read, she did not hear her name.²⁶ She testified that she went home and refused to answer telephone calls which came from the plant by way of her neighbors' telephones. According to Ernestine Hack, a friend of Bate, and a credible witness, Herrerias came to Hack after the layoff meeting and asked where Bate was. Hack told Herrerias that Bate was mad because her name was not on the list and that she "took off." Hack testified that Herrerias got the name and telephone number of Bate's neighbor and tried to reach Bate but was unsuccessful. Herrerias then gave Hack permission to use the office telephone to try to reach Bate, as Hack suggested that Bate might speak with her although refusing to speak to Herrerias because of pique. Hack telephoned a neighbor of Bate's but was given the message that Bate was not home yet. Hack quoted Herrerias as saying that she was worried about "this union deal." Hack commented that there was going to be a union meeting that night and Herrerias said, according to Hack, "Yes, that's one

²⁶ Ernestine Hack, a friend of Bate, testified that she, likewise, did not hear Bate's name read.

of . . . what I'm afraid of." After the end of the shift, according to Hack, Herrerias gave to Hack a slip of paper on which she had written her name and telephone number and asked Hack to have Bate telephone her. Hack testified that she gave Bate the message the next morning. Bate testified that she telephoned Herrerias on Saturday morning, October 16, as requested, and that Herrerias asked why Bate had not come to her when she thought her name was not on the list. Bate testified that Herrerias then asked her to come to her house. Bate testified that she did go there and that, when she arrived, Herrerias asked her why she had not come to the office. "I was so worried about you," Bate quoted Herrerias as saying, "your name was on the list. Did you know you could get me into an awful lot of trouble if you wanted to, because I confided in you an awful lot." Bate further testified that Herrerias said that Martini did not trust her (Bate) because Bate's husband was such a strong union man, but that she (Herrerias) would fix it up so that Bate could go back to work.

Herrerias did not refute Hack's testimony of an attempt by Herrerias to reach Bate by telephone the night before. She made no mention of it at all. Yet she testified that Bate came to her house unexpected about noon on Saturday, October 16, laid the purloined list on the kitchen table, refused a cup of coffee, which Herrerias offered, and left with practically no conversation,²⁷ and in any event

²⁷ The first time Herrerias was on the stand, called by the General Counsel, although she was not a

none about Bate's failure to work on the night of October 15, nothing about Herrerias' effort to reach Bate by telephone, and nothing about Bate's returning to work the following Monday or fixing things up so that she could come back to work. I am convinced that Herrerias' testimony was not, in its entirety, the truth or the whole truth about this incident.

friendly witness, she testified that when Bate walked in through the back door she was surprised to see Bate and asked her what she wanted and that Bate said "that here was the list that I had asked her for, and I said that I didn't know anything about the list and don't leave it here, and she said, 'I don't want it either,' that there was no further conversation other than that she had asked Bate if she would like a cup of coffee and that Bate had said "No, she had to leave," and that she did leave. Later, when called as a witness for the Respondent, Herrerias denied Bate's testimony of the conversation at her house on October 16 and testified: "We had no conversation of any description. She just came in, dropped the list. I asked her, 'Would you have a cup of coffee,' because I was in the kitchen. She said, 'No, I am in a hurry,' and that was all that was said." On cross-examination by the General Counsel, Herrerias this time gave the following version of the conversation after Bate entered the back door: "I said, 'Well, what are you doing around here?' And with that she took the paper and threw it on the kitchen table, and I said to her, 'What is that?' She said, 'That is the list of the girls.' I said, 'Well, why are you bringing it to me?' She said, 'There it is, you can have it.' I said, 'Why don't you take it?' She said, 'I don't want it. Do what you want with it.' I said to her, 'Well, will you have a cup of coffee?' She said, 'No, I am in a hurry because my son is waiting for me,' and that is all there was."

The fact that I find part of Herrerias' testimony to be incredible makes it difficult to believe her testimony that the list was delivered by Bate on October 16. On the other hand, other facts make it conceivable that the list was in fact delivered by Bate to Herrerias on that date. In the first place, certain aspects of Bate's testimony want explanation. According to her testimony, she took the union list after the union meeting on October 13 and put it in the pocket of her car. But she testified that that meeting started at 1:30 or 2:30 p.m. and that she returned home before going to work that evening. From this it appears that the meeting was in the afternoon and that Bate had the list in her car during the night shift that began at 4 p.m. on October 13. Yet her testimony was that she delivered the purloined list to Herrerias at about 8:30 p.m. on October 14. She gave no explanation of why she would give it to Herrerias on October 14 but not on October 13, especially if she took the list for the purpose of giving it to Herrerias. The fact that Bate's neighbor reported to Hack, in the telephone call on Friday night, October 15, that Bate was "not home yet" suggests that this may have been a fact rather than that the neighbor was telling a falsehood to accommodate Bate. If Bate was not home, it is not improbable that she, like many other laid-off employees, went to the union hall on the evening of October 15 to report the fact of their layoff to the Union, and she could have acquired the purloined list that evening. Bate testified that she did not remember if she attended any other

union meeting between October 13 and the date of the election. If she had been at the union hall on the evening of October 15, there are two possible explanations of why Bate would, even though laid off herself, have delivered the list to Herrerias on October 16—she could have been using it to induce the Respondent to re-employ her or, if Bate had been a stauncher union advocate than she seemed, she could have been putting the list in the Respondent's possession in the expectation that a revelation thereof, with testimony of an earlier delivery, would make it appear that the Respondent had used the list in making its selection of employees for the layoff. The former seems more probable, but I am not finding either explanation to be fact. I mention them merely to show that it would not be incredible to believe that Bate did in fact deliver the list to Herrerias on October 16. A further consideration is that, if Bate had delivered the purloined list to Herrerias before the day of the layoff and if this came to Duckworth's attention, as it must have if it had been used in selection of employees for retention or layoff at the meeting held for that purpose on October 14, it is doubtful that Bate's name would have been left off of the retention list. But the evidence convinces me that it was left off and that she was in fact rehired on Monday, October 18. True, Hack testified that, after the layoff meeting on October 15, Herrerias showed her Bate's name on "the list," but Hack was unable to say that it was the same list as the one which had been read at the layoff meeting, and she

had already testified that she had not heard Bate's name read at the meeting. Bate's testimony of her conversation with Herrerias on Saturday would explain why her name was not read for retention even if Herrerias had intended to retain Bate. There is evidence that Herrerias had, like other supervisors, made up a list of employees she wanted to retain and Bate's name may have been on it, but I find that it was not included in the final list prepared for reading at the layoff meeting on Friday evening, October 15. Bate's time card for the week ending October 16 carries a false, but unexplained, note that Bate went home ill on October 15. Certain other notations on the same card had been erased. One exhibit, prepared by the Respondent but introduced by the General Counsel (General Counsel's Exhibit 41e), is a list of night-shift employees as of October 15, 1954, showing which employees were to be transferred to the day shift, which ones worked on the night shift October 15, and which ones "walked off," that is, failed to complete the shift after having punched in. On this list, Bate is shown as having walked off and as not having been transferred to the day shift. And an exhibit introduced by the General Counsel, which had been delivered to him by the Respondent as a list of those whose names were read for retention at the layoff meeting, did not contain Bate's name.

Although it is difficult to credit testimony, in part, of a witness who had been discredited on other testimony, Herrerias' testimony of the date of receipt of the purloined list, not inconsistent with

her own affidavit (made at a time when Herrerias apparently desired to unburden herself with respect to this list) strikes me as not improbable. But even if Herrerias were not to be credited on the date of delivery of the purloined list, I am doubtful enough of the accuracy of the evidence of an earlier delivery to refrain from relying on such evidence as an element in deciding whether or not the Respondent made a discriminatory selection of employees for retention and layoff. The evidence with respect to the Respondent's receipt of the purloined list does establish, however, by either account, that the Respondent was interested in learning the identity of pro-union employees even after the layoff.

Numerous items of evidence disclose that the Respondent was aware of union interest among the employees, of the identity of many employees who were interested, and particularly of the identity of active union advocates among the employees. Manager Martini was accustomed to banter with some of the employees about their union connections. Instances of this and of his conversations about the Union have already been related. To show that the Respondent was aware of the identity of other union advocates, the following incidents are related:

During late August and the month of September, union representatives would appear on the highway near the plant at noon and at the time for change of shifts and address the employees over a loud speaker. Manager Martini would frequently make remarks to Clarence Storey, the day shift

apple dumper, at his place of work, such as, "Storey, you're slipping. Your boys aren't out there yet," and "Storey, I hear your boys out there. I hear them talking." On one occasion in September, both Storey and his wife, Orice, who was then working on the sorting belt near him, invited Floorlady Hardin to come to a union meeting. Hardin declined. Mention has already been made of conversations about the Union which Martini had with Gloria Pate and Gloria Lindsay. One day, early in October, when Lindsay, whose regular job was on the peeler or on the trim line, was working in the can car (a railroad car containing new empty cans) as relief for one of the other girls, (Ruth Clark or Shirley Veach or another girl) Martini came and asked her what she was doing there. She said she was there as relief, and, according to Lindsay, Martini said, "Well, what are you trying to do, change them over to the Union?" When she denied this, Martini said in a manner which Lindsay described as "wise-cracks," "I bet you are campaigning for them . . . I ought to put you over with Mr. Storey, you two could have a ball." Martini denied making such statements but I am convinced that Martini denied making some statements merely because, at the time, they seemed unimportant and, by the time of the hearing, he had no recollection of them. As the statements were banter, I do not find any unfair labor practice.

On one occasion around the first of October when Marie Tripp was working in the can car with Ruth Clark and Shirley Veach, according to Tripp, Mar-

tini said "something about it would be nice if we could get Storey over to the can car because then he would be away from his job and Martini could fire him. Martini denied making this statement, too. I believe that Tripp did hear some statement made concerning Storey, but I received the impression that Tripp had not clearly heard Martini and may have taken the statement out of context or filled in what she did not hear with what she supposed he had said. She gave no circumstances to indicate how such a statement came to be made. So, as the evidence stands, it came out of the blue. It seems improbable to me that Martini in all seriousness would make such a statement to employees and certainly not unless he had good reason to believe that the employees to whom he was speaking were anti-union. Under the circumstances, I am not disposed to base a finding on this portion of Tripp's testimony.²⁸

Tripp testified that on October 14, the day the union buttons were handed out and were first worn in the plant she was working in the can car with Ruth Clark and Shirley Veach, that she, herself, was wearing her union button on the collar of her blouse. Clark and Veach were wearing union buttons on the seats of their blue jeans.²⁹ William McGuire, the Respondent's sales manager and re-

²⁸ Tripp later told Storey about this, and Storey, as a consequence, remained closer to his station than before.

²⁹ Veach had not signed a pledge card for the Union.

ording secretary for the board of directors, stopped at the can car and asked where the girls' buttons were and they showed him. Then one of the girls asked where his was and he raised the bottom of his shirt (which he wore outside his pants) and showed a union button on his pants near his hip pocket. I do not credit McGuire's denial.³⁰ However, I draw no inferences adverse to the Respondent from the above incident (which I interpret to be an attempt by McGuire to be facetitious) except to the extent that it has a bearing on McGuire's credibility.

Ernestine Albini was employed in the Respondent's office in 1954, as a relief switchboard operator and office clerical worker. She testified that, a couple of days before the layoff, McGuire was about to check a list of names with the payroll clerk, Lloyd Marsland, and that McGuire remarked that he would like to know who was for the Union so that they could make up another list. McGuire denied this. As I do not find McGuire's testimony reliable on critical matters, I do not credit his denial. Although I find indications of confusion

³⁰ McGuire denied wearing a union button, and claimed that in October 1954 he had for a couple of days worn only an "I like Ike" button which he had gotten from an employee named Arnold Grant. The latter testified credibly on rebuttal that he had worked at the Respondent's plant in 1952 and 1953, but not in 1954, that he had a number of election buttons in 1952, but that he did not give any to McGuire either then or when he was at the plant once or twice when he stopped there in 1954.

with regard to details of other matters in Albini's testimony,³¹ I believe it was honest confusion and that she did not deliberately fabricate the testimony above related. I therefore credit it.

Floorlady Hardin at one point testified that the only employees who had talked to her about the Union were Zelma Brines and Joanne Chames. She told them that she thought that the Union was not good for them in a seasonal industry. But when testifying that these were the only employees who had talked to her about the Union she apparently did not have in mind the invitation to attend a union meeting which had been extended to her by Clarence and Orice Storey. When asked, she acknowledged that they had invited her. Knowledge by the Respondent of union attitude of employees is also illustrated by Hardin's testimony that, when union talk first started, she learned that employees Fanny Garrison, Gloria Pate, and Gloria Lindsay were agitators for the Union. She reported this to Superintendent Duckworth, who told her to watch them.

³¹ It appeared to me that Albini was confused about the time when she typed an exhibit showing the names of employees retained after the layoff. She identified it as the very list which she had typed before the October 15 layoff. At that time she would not have put on it the heading, reading in the past tense, that it was a list of names of employees read by McGuire at the October 15 layoff. This does not mean that Albini had not typed a list of such names to be read by McGuire, but I believe General Counsel's exhibit 36 was a copy made sometime after October 15 rather than the identical list.

E. The October Layoff

1. The Evidence

Following a meeting of the board of directors on October 12,³² at which the manager was directed to terminate the night shift which was to operate beginning Monday, October 18, and he consulted with Sales Manager McGuire to determine what previous orders of supplies could be cancelled. McGuire caused to be prepared a list of the names of the current day and night shift employees for use by Superintendent Duckworth. The latter instructed each of the supervisors to make up a list of employees he wished to retain. Floorlady Hardin of the day shift had been replaced during an absence on account of illness, but during the week of October 11 to 16 she was working in the cannery office. She did not participate in the selection of female employees on the day shift and there is no evidence that her successor was requested to do so.

³² The date is taken from the minutes. The regularly monthly meeting would normally have been held on October 13. The advancement of the date, witnesses for the Respondent testified, was to permit a man named Hallberg (who operates O. A. Hallberg Cannery at Graton, a little way north of Sebastopol, and who was president of the Apple Growers Council) to attend the meeting to learn if the Respondent was going to continue as a member of the Apple Growers Council; because Hallberg was, according to the Respondent's witnesses, leaving for the East the next morning, the meeting date was advanced. The minutes themselves give no impression of the need for advancement of the meeting date.

On Thursday afternoon, October 14,³³ Superintendent Duckworth met with night shift Floorlady Herrerias and night shift Foreman Williams in a small storeroom on the cannery balcony near the laboratory and cannery office. Laboratory technician Esther Doty was working there at the time, but she was permitted to remain. During the meeting, Warehouse Foreman John Aguire came in for about 5 minutes to leave his list of employees to be retained. Sales Manager McGuire and a foreman named Schuster were present for a short time also but did not participate in the actual selection of employees.

Pursuant to directions from Manager Martini, a notice was posted, and employees were also verbally notified, that a meeting would be held in the warehouse at the end of the day shift on Friday, October 15, and that employees of both shifts should attend. This was the first such meeting ever to be held. At the appointed time the employees assembled in the warehouse. Martini told them that be-

³³ McGuire testified that he gave Duckworth the list of day and night shift employees on the day after the directors' meeting and the list of employees to be retained, herein called the retention list, was returned to him the following morning, but he testified that his discussion with Martini about cancellation of orders was on Wednesday morning, October 13, that he gave Duckworth the list of employees that afternoon and received it back with alterations on Thursday morning. Other supervisors set the time of the meeting to select employees for the single shift on Thursday afternoon, October 14. I conclude that McGuire was mistaken that he received the list back on Thursday morning.

cause of shortage of space in the warehouse, one shift would be laid off and that, as much as possible, the people would be laid off in the order of seniority. Paul "Tony" Bondi, chairman of the board of directors of the Respondent, told employees that there was very little space left in the warehouse, that the Respondent was sorry that they had to lay off a shift, that there were not too many apples to come in from the growers and there were not too many left in cold storage, that as in the past 2 years the employees were invited to the dinner at the end of the season. McGuire told the employees that those who would not be working could turn their caps and aprons in and they would be paid for them. He then read a list of those who were to report for work on Monday, October 18.

The list of employees to be retained, as read at the layoff meeting of October 15, although prepared and supplied by the Respondent (and introduced in evidence as General Counsel's exhibit 36) was claimed by the Respondent at the hearing to be not an accurate copy. At the hearing, the Respondent introduced in evidence another list of names (as Respondent's exhibit 13) which it claimed was "the list" read at the layoff meeting. (This list contained, among others, Bate's name.) But this list does not jibe with the evidence as closely as does the list originally furnished to the Board (General Counsel's exhibit 36). For example, there was evidence that some of the women whose names were read for retention (according to their own testimony) were unable to work on

the day shift and so did not work after October 15, 1954. Their names were on General Counsel's exhibit 36 but were not on Respondent's exhibit 13. Among such names were those of Ploxa, Rawles, Joanne Chames, and Ensebia Carrera. Such testimony suggests that Respondent's exhibit 13 was a list of employees working after October 18 and made up at some date after October 15 rather than the original list read on the latter date. The Respondent's exhibit contained the name of Arthur Heflin, who testified that his name was not read at the layoff meeting and hence his name ought not to appear on such a list. He further testified that Superintendent Duckworth rehired him right after the union election on October 19. Heflin's name (contrary to its appearance on the Respondent's exhibit) was not on the list furnished to the Board and introduced as a General Counsel's exhibit 36; so Heflin's testimony supports the General Counsel's exhibit as the correct list. The name of Beulah Cassidy, shown on General Counsel's exhibit 36, was stricken in pencil from Respondent's exhibit 13. McGuire testified he had stricken the name because it had been copied into Respondent's exhibit 13 through error, yet the records of the Respondent show Cassidy as employed to the end of the season. Thelma Ziegenbein's name was on the General Counsel's exhibit but not on the Respondent's exhibit; yet she also is shown by the records to have been employed until the end of the season on December 11, 1954. The same is true of Cornelia Jones, Helen Smoker, and, with the exception of

the date of final employment, of Frances Connors, Elsie Dickerson, and Evelyn Cuttress. Edna Hardin (the day-shift floorlady until she became ill) testified that, after she returned from an absence because of illness, she worked in the cannery office from October 11, 1954, for 3 weeks. She testified that she attended the layoff meeting on October 15 but her name was not read for retention, that after the meeting she spoke with Superintendent Duckworth about it, and he told her she could return to work on Monday, October 18. Hardin's name was not on General Counsel's exhibit 36 but was on Respondent's exhibit 13. Although some of the evidence suggests that General Counsel's exhibit 36, prepared by the Respondent, may have varied from the original list read by McGuire at the lay-off meeting, I find that it is more accurate than Respondent's exhibit 13, and that it is substantially accurate; so I rely on it in making my concluding findings.

After the meeting on October 15, the majority of the night shift employees returned to work. However, between 20 and 30 of them, who had punched in before the meeting, but whose names (with one exception) had not been read by McGuire as retained, left and did not work on the night shift that night.³⁴ The disputed facts about

³⁴ The Respondent contended that these employees quit and were not therefore laid off. The General Counsel contends that there was confusion and misunderstanding about the question of whether or not they were to work that night and that, if they were not actually laid off, they were constructively laid off. This issue will be dealt with later herein.

the layoff will be related hereinafter in connection with conclusions to be drawn respecting the reason for the layoff. Employees who worked after the layoff apparently received an increase in pay, for although the rate for the day-shift women had previously been 95 cents an hour, personnel records show pay at the rate of \$1 an hour after that date.

2. Concluding Findings Regarding the Layoff

It is the General Counsel's contention that the layoff was accelerated by the Respondent so as to affect the result of the Tuesday, October 19, election but that, even if the layoff had been dictated by economic necessity in the ordinary conduct of the Respondent's business (which he contends is disproved), the selection of employees was discriminatory and that by means of such discriminatory selection the Respondent contrived to lay off a large enough number of union sympathizers to affect the result of the election.

(a) The Necessity for the Layoff

The Respondent gave as the reason for the lay-off that its warehouses were almost full and that the supply of canning apples after October 15 would not be enough to warrant more than one shift. The production of canned goods with one shift operating, the Respondent explained, was not expected to exceed the capacity of the Respondent's warehouses because sales would remove canned goods from the warehouses at about the rate of production on one shift.

The General Counsel attacks the claim that the Respondent was short of space to house its production, even at the rate that could have been produced by two shifts after October 15, 1954. But he does not even concede that a shortage of apples after that date came about in the ordinary course of the Respondent's business, because, he asserts, the Respondent diverted a huge supply of its own apples to another cannery—the Co-op—to be canned for the Respondent, and the General Counsel contends that the Respondent was motivated in doing this, not by economic considerations, but by a purpose of putting itself in a position to lay off some of its own employees before the union election (a layoff earlier than normally would have been the case) so as to affect the result of that election.

The Respondent admits that the Co-op canned a large quantity of apple sauce for it from apples supplied by the Respondent, but it contends that this was necessary because a high percentage of apples received from growers in 1954 was unsaleable as fresh fruit, that this created such a large supply of cannery apples that production, even with two shifts, could not use the supply fast enough to keep the apples from overflowing the cold storage facilities, and that the apples were beginning to rot.

A vast amount of evidence was introduced, both in documentary form and through testimony of witnesses, in order to establish the respective claims of the parties. Much of the testimony is conflicting and cannot be accepted as reliable. But it may be

taken as uncontroverted that the 1954 Sonoma County apple crop was a large one, almost 12 per cent larger than in 1953, yet less than half as much of the crop of early apples was fit for sale as fresh fruit. The late apples were of better quality, the percentage of tons usable for sale as fresh fruit being up some 50 per cent over the 1953 crop, but the proportion used for canning was also greater, the proportion of late apples used for canning being up about 23 per cent over the 1953 crop. When apples are delivered to the Respondent by growers, they are classified either as cannery apples or as fresh fruit. Cannery apples are those which because of kind, size, or lack of quality are unfit for sale as fresh fruit. Cannery apples go direct into the cannery or go into cold storage (if there is room there) for future use in the cannery. Apples classified as fresh fruit go first to a packing shed, where the market grade apples are separated from the unmarketable apples. Those which are eliminated as not of market grade are called culls. Culls include not only those apples which are blemished or damaged but also perfectly good apples that are either too large or too small for market trade. The bloom on the apple, which helps to preserve it, is wiped off in the packing shed whether the apple is marketable as fresh fruit or is a cull. Also the culls receive a certain amount of bruising in the handling and boxing. The result is that culls will not keep as long as orchard run apples (cannery apples) which never go to the packing shed but go direct to the cannery or to cold storage for

future use in the cannery. Even in cold storage, the period during which an apple will keep will depend, in part at least, on its condition when it goes into cold storage. I deduce that culls normally do not last as long there as orchard run apples. In earlier years, according to Former Superintendent George Silva, he had kept Gravenstein apples in cold storage for as long as 3 months and late apples as long as 5 or 6 months. I assume that the maximum time was for orchard run apples. The maximum period that culls would last in cold storage he did not state. Although witnesses for the Respondent testified that culls would not hold up in cold storage, I do not accept such testimony as fixing the length of time which they would hold up. I infer that in years before 1954 culls had been kept in cold storage for a period of time the duration of which is not precisely fixed, but which would be long enough to permit their use in the cannery, a month or two at least.

During the 1954 season, the Respondent began to put apples in cold storage from the outset. Even fresh apples, as marketable apples are called, went into cold storage because the market early in the season was not favorable for quick disposition. This was also a condition that was frequently encountered in earlier years at the beginning of the season.

The peak of the harvest of Gravenstein apples (early apples which compose the greater part of the crop in Sonoma County in which Sebastopol is located) comes in mid-August, and at that time the Respondent fills its cold storage plant and ware-

houses and then puts the excess on or under its porches and even in the open. Each year during the peak of the Gravenstein season, the early apples come in faster than they can be used in the cannery, and, with storage rooms full, some of the apples are left in the open until they can be run off in the cannery. Some of the apples which are piled in boxes in the open, especially those in the top boxes, if not covered, will get sunburned, and the sunburned part of the apple will be cut off by the trimmers in the cannery along with blemishes, worm holes, etc. Silva, who had been the Respondent's superintendent between the spring of 1952 and the spring of 1954, testified that about one-sixth of a sunburned apple might have to be cut away. It takes about 2 weeks to use up the overflow of apples in the open after the peak of the harvest. This appears to have been true in 1954 also.

According to the Respondent's witnesses, the Respondent became concerned about the prospect of spoilage of apples late in August. One of these witnesses was Ezra Briggs, a director of the Respondent and also chairman of the board of directors of the Co-op. According to Briggs, he told Manager Martini on about August 27, 1954, that the culls were increasing and that they should either be canned or sent to a drier. He testified that Martini answered that he thought the crop was at the peak and that he could handle it. Briggs testified that on about September 5 to 10 he again raised the subject of disposing of the culls and that Martini agreed that the overflow was beginning to spoil

and said he would find some place to put them. Briggs told Martini, he testified, that the Co-op would can them for him or would take them to a drier and that Martini replied that he would hunt up a place right away. Briggs testified that at a special directors' meeting, the pile up and spoilage was mentioned but no action was taken on it—it was just left up to Martini and the cannery committee (which had authority only to make recommendations to Martini).

Evidence as to a decision by the Respondent to authorize Martini to send apples to the Co-op to be processed (which it was conceded he would need) was vague. Martini, himself, did not testify that he made the decision, but on Monday, September 13, shipments of apples from the Respondent to the Co-op for canning began.³⁵ It will be remembered that the Co-op had just laid off one shift as of Friday, September 10. Between September 13 and October 15, the Respondent delivered 1358 tons of apples to the Co-op for canning for the Respondent, allegedly for the sole purpose of avoiding spoilage of apples. Manager Martini and Rollo Winkler, vice-chairman of the board of directors, testified that in 1954 the spoilage amounted to 700

³⁵ About 74 or 75 tons of apples (according to one of the Respondent's exhibits) had been sent by the Respondent to the Co-op for canning in July 1954 because the Respondent had an order for 15,000 cases of apple sauce in a small sized (8 oz.) can which the Respondent was not equipped to seal. The General Counsel does not contend that this shipment was made for any reason other than the one given.

tons of apples as compared with 25 or 50 tons in 1953, and Martini testified that the spoiled apples were dumped in the fields or in a trench and covered up. Martini had not mentioned such spoilage or disposition in an affidavit he had made some time before the hearing. Where Martini and Winkler got the 700 ton figure does not appear. In Winkler's case, it sounded like hearsay. No records were offered to substantiate this testimony of the disposal of 700 tons of waste. I find it impossible to believe that such loss in fact was suffered. Records which were produced at the hearing accounted for the use of the entire tonnage of apples received by the Respondent in 1954. None of it was shown as waste.³⁶ Winkler testified that concentrate is made from peelings and cores. Apples too small to peel are sold for juice. The only part thrown away is that which rots. I infer that a certain amount of waste may remain after the making of concentrate. Perhaps this waste was included in the 700 ton figure.

Winkler's testimony did not appear too consistent to me, and his testimony tended to be given with-

³⁶ Total tonnage received.....	16,741.04
Packed as fresh fruit.....	4,648.48
*Sold to other processors....	1,121.51
Dryers	867.08
Co-op (for canning).....	1,432.80
H. H. Rider (juice apples)	205.92
Cannery	8,465.25
	<hr/>
	16,741.04 16,741.04

*[I infer that these outlets were S & W, Blaufus, Macomber, Russell Taylor.]

out accurate basis in a number of instances. He testified that the apples began piling up outdoors in the latter part of August and that they were there long enough to begin to rot—3 or 4 weeks. I believe his estimate of time to be exaggerated, but assuming for the sake of argument that they were outdoors for 4 weeks, that would mean that they were there at the latest until late September. Deliveries to the Co-op started on September 13. Therefore, deliveries would have been made to the Co-op only until about September 28 instead of until October 15. Winkler testified that the “decision to turn the night shift loose was made after we had worked this surplus fruit out of the way and the remainder of our fruit was left in cold storage where we could handle it.” But the decision to lay off one shift was made on October 12, and the evidence clearly shows that apples were taken to the Co-op from the cold storage plant before that date as well as after.

If the testimony of John Gregori, a member of the Respondent, is accurate as to date, he hauled about 500 tons of the Respondent’s apples which had begun to spoil to dryers in the latter part of August. Because Gregori was only a member and not an officer or director of the Respondent, I make no finding with respect to the testimony of Marie Tripp that Gregori made a statement in the nature of an admission. Records in evidence show that a total of 848.9 tons of apples went from the Respondent’ to dryers before October 15 and 18.18 after that date. The total amount sent to dryers

in 1954 is a smaller quantity than in either of the next two preceding years. Yet the evidence shows that it is fruit too poor to can which goes to the dryers. If so many bad apples were in the crop, the proportion sent to dryers would be expected to be greater. Although Respondent's witnesses testified that the dryers could not take more apples from the Respondent in 1954, I am not convinced that this testimony was true. It does not appear why the dryers would be able to take less tonnage from the Respondent in 1954 than in prior years.

Apples used in the cannery are started on their way by being dumped onto a conveyor by an employee called the dumper. The apples then cross rollers where employees called sorters pick off the rotten apples and any that would not peel. The remaining apples go over an eliminator belt where small apples, called juice apples, are removed. The rest of the apples then go into a flume into the cannery. Clarence Storey, the day-shift dumper during the 1953 and 1954 seasons (until the October 15 layoff) testified that he saw no more rotten apples in 1954 than in 1953. He also testified that he kept a record of rotten and spoiled apples removed at his station for the Respondent's records. If his testimony was not accurate, the Respondent needed only to produce the records, but it did not do so. I infer that all but a negligible quantity of the apples unfit for use in the cannery were used for juice, cider, concentrate or drying, and that such apples are accounted for in the Respondent's records accordingly.

I am not convinced that the need for getting the assistance of the Co-op beginning on September 13 was as pressing as was represented, if at all. According to Martini's testimony, the overflow of apples in the yard would have been worked off in 2 or 3 weeks from the peak of the Gravenstein period, which came around August 20 to 23; so, according to him, the overflow would have been gone by September 10. That would leave only the apples in cold storage to be disposed of. There are indications in the testimony of the Respondent's witnesses that they tended to shade their testimony and to exaggerate the need for disposal of the apples even from cold storage.³⁷ Briggs also testified that Gravenstein apples from cold storage as well as from the open yard went to the Co-op because they were spoiling—"a bruised apple in cold storage don't hold up." I cannot conceive of the removal of apples from cold storage by the Respondent for shipment to the Co-op for canning unless the situation was truly desperate or unless the Respondent had an ulterior motive in disposing of its apples in that way, for it would greatly increase the cost to the Respondent to have the Co-op process the apples for it. Not only would the Respondent have to pay a processing fee to the Co-op but it would have to pay to ship the apples

³⁷ Briggs put the peak of the Gravenstein season as on September 10, 3 weeks later than Martini did. It is difficult to understand why the Co-op would be laying off employees right at the peak of the season, if September 10 were the peak. I do not credit this testimony of Briggs.

to the Co-op and would have to pay to have the canned goods shipped back to it.³⁸

Gravenstein apples in cold storage in former years had held up for canning for as long as 3 months. The only plausible explanation offered for the inability to keep them in cold storage for as long a time in 1954 was that the culls were more bruised than in former years. This occurred, according to the Respondent's witness, Briggs, because of the large crop, and the fact that the culls had to be run through the packing shed faster and so got rougher handling.³⁹ Even granting, for the sake of argument, that this could have happened, I am not convinced that removal of apples from storage, not only on September 13, but for a solid month thereafter until October 15, was dictated by a desperate need. Although apples begin to go into cold storage at the beginning of the season, in the latter part of July, those apples would not be the

³⁸ Counsel for the General Counsel, in his brief, points to figures tending to show that it cost the Respondent more to have the apples processed by the Co-op than the average price for which the Respondent sold the product.

³⁹ Alfred W. Cook, supervising agricultural inspector for Sonoma County, who was at the Respondent's plant every day for several hours in the 1954 packing season, confirmed that there was a large cull-out because of sunburn or sunscald, but he testified that the machines in the packing shed were slowed down to give the workers time to remove culls. This would indicate that the culls would not be handled any more roughly because of haste, since the machines were paced to the workers' speed.

ones that would be expected to be still in cold storage on September 13, for the Respondent's cannery, with two shifts operating, could use from 60 to 100 tons a day, so the apples would be going out of cold storage at a steady rate for cannery use until the peak of the Gravenstein season brought apples in too fast; so the first apples in would not be the last ones out. It is doubtful that the cannery apples in cold storage in mid-September had been there longer than 5 or 6 weeks. If apples in the open would hold up until they were worked off in 2 or 3 weeks, as had been true in former years and as I infer from the testimony could have been done in 1954, I am convinced that the apples in cold storage were not in desperate condition on September 13 or thereafter. The Respondent, in presenting a picture of apples spoiling in cold storage made no effort to differentiate between culls and orchard run apples, although the latter were capable of being kept longer than culls because the bloom had not been removed from them.

The Respondent, according to its own evidence, decided on October 12 that its warehouses were filling up with canned goods and that, because of that and a prospective shortage of apples⁴⁰ it was

⁴⁰ Martini testified that he estimated the remaining quantity of apples to be received from growers after October 15 to be about 250 tons. So from October 18 to December 11, when the cannery closed for the season, the single shift would have been using those plus what was in cold storage. From figures in evidence, I would estimate that at least 550 tons of apples came from growers after October 15.

necessary to lay off one shift. But if such facts were known on October 12, why should the Respondent continue to send apples out of cold storage to the Co-op for canning on October 13, 14, and 15, thus, in effect, running three shifts for an additional 3 days instead of immediately discontinuing the Co-op shipments? In those 3 days the Respondent shipped about 136 tons of apples to the Co-op.⁴¹ It is difficult to believe that the apples shipped to the Co-op on those 3 days would not have lasted until used up in the Respondent's own cannery even if such apples had not been of the most lasting quality. The apples remaining in cold storage after October 15 would have had to remain in cold storage longer when only one shift was using them than if there had been two shifts using them, and that apparently was not cause for concern.

It is also difficult to believe that the rapid filling of the warehouses with canned goods resulting from the utilization of the Co-op's facilities as well as its own was something that just dawned on the Respondent on October 12. It was a condition that any management must reasonably be expected to have foreseen. Knowing that the warehouses would take no more canned goods if three shifts were used, counting the Co-op's processing as the equivalent of one shift (evidence is lacking of the rate of production by the Co-op), the Respondent might be expected to eliminate the costliest shift (the Co-op) first so as to permit sales and shipments to

⁴¹ This would produce approximately 6800 cases of apple sauce in No. 303 cans.

catch up to some extent with manufacture. But this was not done. The supply for the third shift (the Co-op) was continued until the very day of the layoff of the Respondent's night shift. No evidence was adduced to disclose when the apples delivered to the Co-op were canned and returned to the Respondent. When asked when the Co-op finished delivering the canned product to the Respondent, Martini was unable to answer with any degree of certainty. The bulk, he testified, came back upon packing, but when that may have been is not specifically shown. If it did not come back in 1954, Martini agreed, it came back early in 1955. By use of figures in evidence, I conclude that the Co-op canned and returned to the Respondent about 25,000 cases of apple sauce after October 15, 1954.⁴² If the

⁴² The Respondent had an inventory of 27,392 cases of No. 303 apple sauce on June 30, 1952. As the canning season did not begin until mid July 1954, the inventory apparently was part of the 1953 pack. By October 15, 1954, the Respondent itself produced 155,830 cases of No. 303 apple sauce. That made a total of 183,222 cases. Up to October 15, 1954, the Respondent had shipped out 55,983 cases of No. 303 apple sauce. If the Co-op had not packed any for the Respondent, the Respondent's inventory on October 15 would have been 183,222 less 55,983, or 127,239. But its inventory was actually 167,009 cases of No. 303 apple sauce on that date. Since the Co-op canned only No. 303 cans with apple sauce for the Respondent from the apples delivered to it after September 13, 1954, I conclude that the difference between 167,009 and 127,239 represented the number of cases processed by the Co-op for the Respondent before October 15, 1954. This difference is 39,970. As the Co-op produced a

apples delivered to the Co-op could not, in such a substantial amount, be packed until after October 15, I can see no rational or credible explanation for sending the apples to the Co-op for canning that was to be done after October 15 when the Respondent could have retained its own second shift and canned the sauce itself just as fast and cheaper. And, it may be asked, where were the apples which were waiting to be canned at the Co-op? Did the Co-op set them aside in cold storage, in warehouses, or in the open? The fact that the Respondent sent to the Co-op apples that could not be packed for some time after October 15 but laid off its own employees to reduce its own production after that date is a potent argument in support of the General Counsel's contention that the apples were sent to the Co-op so that the Respondent could effect a layoff before the date of the union election and thus affect the result of that election. And this conclusion would be warranted even without evidence adduced by the General Counsel of a verbal admission by the Respondent's superintendent. Frank Unciano, a non-union employee, testified credibly that outside the warehouse, about 3 weeks before the layoff of October 15, he asked Superintendent Duckworth why they were sending off the apples to the Co-op and that Duckworth replied that "he

total of 65,322 cases of No. 303 apple sauce for the Respondent from the apples delivered between September 13 and October 15, I conclude that the difference between 39,970 and 65,322 represents what was delivered by the Co-op to the Respondent after October 15, 1954. This amount is 25,552 cases.

was trying to finish all the apples as fast as they could, because they were afraid the Union was going to get in. . . ." He also testified that Duckworth said "he don't want to do business with the unions, he don't want to sign or whatever happens. . . ." Although Duckworth denied that he had made such statements, I do not credit his denial, and I find that Duckworth made such statements as testified by Unciano.

I am not persuaded that the apples shipped to the Co-op from cold storage were only such apples as could not be used up in time to keep them from spoiling if they were used by two shifts in the Respondent's cannery. I have already shown that the Co-op did not can all such apples by October 15. According to the Respondent's figures, it had an inventory of 1,396.15 tons of cannery apples on October 15. With only one shift, those apples would have had to wait twice as long to be processed as they would have with two shifts. There is no evidence to show that only early apples were delivered to the Co-op or that no early apples remained in cold storage after October 15. And as previously stated no differentiation was made between culls and orchard run apples. Martini testified that the picking of Gravenstein apples began about mid-July and ended about August 20 to 25, but that the cannery continued to use Gravensteins through the month of September. I infer therefore that the Gravenstein apples were used up or transferred to the Co-op by the end of September. Late apples

began to come in during September, after the Gravenstein peak, and culls from late apples would have been coming from the packing sheds throughout that month. The amount of culls from apples other than Gravensteins was small in comparison with those from Gravensteins, according to records introduced in evidence by the Respondent. Yet if Director Ezra Briggs were to be credited, the culls, even at this date were of such poor quality that they could not be put in cold storage because their condition was too poor and therefore they had to be sent to the Co-op lest they become worthless. One wonders what disposition was made of the culls after October 15, if they were of such poor quality up to that date. Briggs' testimony would require the conclusion that, of the apples coming in up to October 15, the culls were too poor to be put in cold storage whereas the culls of those coming in after October 15 were of a quality to keep in cold storage long enough to be worked out on one shift. His testimony taxes credulity. I cannot believe that the improvement in quality came about so suddenly; and if it did not come about so suddenly, many of the apples sent to the Co-op, if they came direct from the packing sheds without going into cold storage, must have been late apples that could have been kept in cold storage for at least another month or two.

Although it is possible to believe that good business judgment could have dictated the delivery of some apples of an overly large crop to the Co-op

for processing to avoid spoilage, I cannot believe, in view of the cost involved, that good judgment dictated the delivery of such large quantities of apples (much of which was not in danger of spoiling) to the Co-op for processing unless the Respondent had an ulterior motive. Martini testified that there had been an overflow of apples into the yard during the peak of the Gravenstein season in each of the three seasons from 1952 and 1954. But only in 1954 were any apples processed for the Respondent at another cannery to avoid spoilage. Martini testified that it might have been wisest to send the overflow to another cannery in the other years, too, but that at such time the other canneries were in the same fix the Respondent was in. I infer that, when apples were sent to the Co-op beginning on September 13, 1954, the rush of Gravensteins was past and the overflow of apples in the yard (i.e. those stacked in the open) had been pretty well worked off in the Respondent's own cannery; for if the peak of the harvest had not well passed, the Co-op would still have been hard pressed to process its own apples and could not have accepted work for the Respondent. I am assuming that the Co-op did not run a third shift in order to process the Respondent's apples, for it would not make sense to deliver apples to the Co-op for processing by a third shift inasmuch as the Respondent could have run a third shift, itself, cheaper than paying the Co-op to process the apples if a third shift had been a feasible solution. I conclude on all the evidence that the Respondent's

witnesses exaggerated the seriousness of the situation.⁴³

From the foregoing it may be concluded that, if the Respondent was running short of warehouse space on October 12, when it decided to lay off its night shift, it needlessly brought the situation on itself by its diversion of apples to the Co-op in pursuance of an illegal object. However, close scrutiny of evidence refutes the Respondent's claim of a shortage of warehouse space on October 12 or 15, 1954. In 1953 the Respondent had a number of scattered packing sheds and warehouses in which it stored canned goods. The cannery building itself had a warehouse which Martini testified was classed as a 100,000 case warehouse. It had a capacity, however, of nearly 114,000 cases. This was the only actual warehouse the Respondent had before 1954, although the Respondent in prior years had made use of some of the packing sheds for warehouse purposes. The packing sheds were not insulated, however, and cans stood a chance of getting rusty in damp weather. In 1952 there was some such damage. This, Martini testified, was the reason for not using the packing sheds for warehouse purposes in 1954. That reason had not been given by him in his affidavit, where he mentioned only the high han-

⁴³ In 1954 the Respondent had about 870 tons more Gravenstein culls than in 1953. The Respondent, with two shifts, could run off that amount within about 2 weeks of canning. A total of 1432.8 tons of the Respondent's apples were processed by the Co-op for the Respondent in 1954, 1357 tons after September 13.

dling costs and the weakened condition of the floor of one shed. In 1953, in addition to the cannery warehouse, the Respondent used a partially enclosed porch attached to its cold storage building (where 70,000 cases were stored), a porch on the cannery building (which took about 6,000 cases), and it installed a heater in one cold storage room so that after that room was empty of apples it could be dried in a couple of days and used for warehouse purposes. This cold storage room had a capacity of close to 140,000 cases. Thus, without use of packing sheds or uninsulated warehouses (other than the porches), the Respondent, in 1953, had room for around 330,000 cases of canned goods. According to the Respondent's inventory, it had 252,166 cases on hand on October 15, 1954. Thus with no more than its 1953 capacity and without use of the packing sheds, it still had space for about 78,000 cases, and taking into account that at that time of the year the Respondent's shipments were about 4,000 cases a day and that each shift produced between 1700 and 3000 cases a day, according to Martini's testimony, the Respondent in all probability had sufficient warehouse capacity for the production by two shifts after October 15, 1954. But even if it would not have had enough room with only its 1953 warehouse capacity, it had adequate space in 1954, because early in the 1954 season, the Respondent finished and used a new, insulated warehouse with a capacity of 180,00 cases. If this were added to its 1953 warehousing capacity, the total 1954 capacity would have been 510,000 cases without use of pack-

ing sheds. Its total production, including all that was processed by others for it, in the 1954 season, was 494,657 cases. Therefore, if the Respondent made no shipments, there would have been sufficient warehouse capacity for its full production; but before October 15, 1954, it had shipped a total of about 145,124 cases and, by December 11, 1954, when the cannery closed, a total of 217,660 cases had been shipped.⁴⁴ It would appear, therefore, that the Respondent would not have had need for space for its full year's production and therefore there would have been an overabundance of space all through the 1954 season.

With respect to the one cold storage room (there being two such rooms, of equal size) in which a heater had been installed in 1953 and which was used for warehouse purposes in that year, Martini testified that it was not used in 1954 because there were apples in there and because it would take about 10 days to 2 weeks to dry it out after it had been emptied. Former Superintendent Silva, who supervised the installation of the heater in 1953, testified that, without the heater, the cold storage room would have to be aired out for a week before using it as a warehouse, but that, with the heater, it could be dried out in not more than a couple of days. I conclude that inability to dry the cold storage room out soon enough to avoid laying off one shift was not a contributing cause for the lay-

⁴⁴ The net reduction of inventory would be smaller by 39,595 cases, on hand on June 30 from the prior season.

off. No evidence was offered to show that more or less than one cold storage room was actually needed for fresh or cannery apples after October 15. Martini did testify that there were apples in both rooms from July 1954 to January 1955, but he also testified that in 1954 one cold storage room was "finally" used for warehousing canned goods. The two statements are not quite consistent. Furthermore, Martini did not say that apples in the two cold storage rooms could not have been consolidated in one. I infer from other facts in evidence that they could have been, if storage space for canned goods had been needed. There was testimony that most of the fresh fruit had been shipped by mid-September.⁴⁵ So presumably the fresh fruit in cold storage after that date was in small amounts. The evidence also shows that, after delivery of 1350 tons of apples to the Co-op between September 13 and October 15, the Respondent had an inventory remaining of 1396.15 tons of cannery apples in cold storage. The proportion of apples sent to the Co-op from cold storage is not shown, but on the basis of a justifiable conclusion that the overflow of apples in the yard was eliminated by mid-September,⁴⁶

⁴⁵ Briggs testified that on September 10 one cold storage room was filled with culls and one with fresh apples to be shipped, but he also testified that most of the fresh fruit had been shipped out of cold storage by mid-September.

⁴⁶ In addition to evidence of this previously stated, there is testimony by Bondi, chairman of the board of directors, that in mid-September Martini told him they had just begun to run apples from cold storage.

most of the apples sent to the Co-op must have come from one of the Respondent's two cold storage rooms. If one room had not been completely emptied by October 15, it must have been so nearly empty that it could have been readied by the time that the remaining space in the warehouses and porches was filled.

I find the testimony of available storage space on October 15 as given by the Respondent's witnesses to be misleading. Warehouse Foreman John Aguire testified that on October 15 both warehouses were filled and that any room after that was made by what was removed for shipping but he did not say that that other space was available elsewhere than in the two warehouses. Toni Bondi, chairman of the board of directors, testified that on October 12 there was still room for an estimated 15,000 to 20,000 cases in the new warehouse. Manager Martini testified that both warehouses were filled early in October and that afterwards they filled in from wherever cases were removed for shipping. Martini did testify that "some" of the canned goods were moved to the cold storage porch, which they began to use early in October, but he did not testify that it was used to capacity. This porch had a potential capacity of 50,000 to 70,000 cases, depending on whether Martini's or Silva's estimate is taken, but little mention of it was made by the Respondent's witnesses. By the testimony of those of the Respondents' own supervisory staff who testified, the warehouses had a capacity of 280,000 cases. I find this to be a conservative estimate. Even with-

out the use of the porches, this would have more than held the 252,166 cases which are shown by the Respondent as on hand on October 15 in its inventory. It does not appear, therefore, that, in any event, the cold storage room was the only remaining available space on October 15, as the figures would indicate that there was easily room for 28,000 cases in the warehouses before resort would have needed to be made of either the porches or the cold storage room.⁴⁷ In 1952 and 1953 with a smaller tonnage of apples, the Respondent did not terminate its night shift until November 6 and November 20, respectively. In view of the preponderance of the evidence, I find that lack of warehouse space on or after October 15 was not a reason for the reduction in production rate. This being the case, the question is one only of the sufficiency of apples for a second shift. Even without the apples which had been sent to the Co-op, enough apples remained so that there would have been no pressing necessity

⁴⁷ Dora Rawles testified that on October 15, after the warehouse meeting at which employees were notified of the layoff, she, Pauline Ploxa, and Ida Fishelson went to Martini to tell him their names were on the list to work but that they could not work days because they had children. Rawles quoted Fishelson as saying, in this conversation, that she had a warehouse in Santa Rosa that the Respondent could rent, and Rawles quoted Martini as replying that "there's more to it than that." Martini did not remember and so denied that any employee had offered a warehouse. But even if Martini had made the quoted statement, I do not view it as necessarily an admission against interest and I base no conclusion thereon.

for laying off the second shift before the election. The fact that the Respondent, under such circumstances, hastened to make the layoff before the election, warrants the conclusion, especially in the light of all the evidence, that the Respondent desired to lay off a substantial number of its employees before the election for the express purpose of affecting the result thereof. By such conduct, I find that the Respondent discriminated in regard to the hire and tenure of those of its employees whom it laid off on October 15, 1954, in violation of Section 8 (a) (3) and (1) of the Act.

(b) Selection of employees for layoff.

In 1951 the Respondent had only one shift. In each of the years 1952 and 1953, when the Respondent terminated the night shift, it laid off the staff of that shift, keeping only such night-shift employees as could be used on the day shift, without laying off any of the day-shift crew. Although Manager Martini testified that some employees of each shift were retained on the single shift in earlier years, I find that his testimony was misleading.⁴⁸ Former Superintendent Silva testified that in 1952 and 1953 only the night crew was laid off when the night shift was terminated and that none from the day shift was affected. Floorlady Herrerias testified that of the night-shift crew in 1953 only she and Mary McGuire, who was a laboratory employee

⁴⁸ Although Martini had just become manager in 1954, he had been a member of the Respondent since 1940 and would have had some knowledge of operations in earlier years.

and the mother of Sales Manager McGuire, were transferred to the day shift. Carmelita Montafi, who had been day-shift floorlady in 1953, testified that Herrerias gave her a list of the women from the night shift that she wanted to retain and, if there was any room for them on the day shift, she would put them on. When the termination of the night shift was directed in October 1954, however, the Respondent laid off employees from each shift. The supervisors (not including the day-shift floorlady) were directed to make up a list of the employees they wished to retain from both shifts.

If credit could be given to the testimony of the supervisors who made their selections of workers, the selection was on the basis of ability and, where that was equal, on seniority. However, I find that such testimony was not the whole truth. In some instances, perhaps, ability and length of service during that season were considered. But the evidence indicated a definite tendency to make an employee's attitude toward the Union a criterion, and in the case of active pro-unionism, the principal criterion in selecting employees for layoff. In the first place, Superintendent Duckworth, Night-shift Foreman Williams, and Night-shift Floorlady Herrerias were the supervisors who made final determination of the employees to be retained. Each of these three had evidenced strong antipathy for the Union. Warehouse Foreman Aguire and Head Mechanic Steve Struempf (whom I find to be a supervisor) each turned in to Duckworth a list of names of employees they wanted to retain, but they

did not remain in the conference long and did not make final determination. Although the Union was not well represented among the male employees, most of whom worked under Aguire or Struempf, the majority of male union advocates were among those laid off, too. Edna Hardin, who had been the day-shift floorlady for most of the 1954 season up to October was, at the time of the meeting to select employees for the layoff, working in the office of the cannery on the balcony quite close to the storeroom where the meeting of supervisors was held. But not only was Hardin not invited to attend the meeting, she was not even consulted about the ability of the respective day-shift employees. As the day shift had only a temporary floorlady on Thursday and Friday, October 14 and 15,⁴⁹ Hardin was the one best qualified to determine the merits of the respective day-shift workers. Although she was not in favor of the Union, Hardin appeared disposed to be neutral.

Evidence that the selection of employees for lay-off was made on the basis of known or suspected union sympathy appears not only from the devia-

⁴⁹ Hardin's successor as floorlady, when Hardin was ill, remained only a short time. On Thursday, October 14, Eva Lee, a pro-union employee, was asked by Head Mechanic Steve Struempf to be temporary floorlady on the day shift. Lee was among those laid off on October 15, 2 days after being appointed floorlady, although she had been hired on July 20, near the beginning of the season. I draw no inference that the Respondent favored a union employee by making her a floorlady for 2 days before terminating her employment.

tion from past practice but also from the disproportionate number of union sympathizers, as compared to non-union employees laid off, from the selection for layoff of almost all of the employees who were on the union committee, and from the fact, that, where the evidence reveals knowledge by the Respondent before October 15 that an employee was outspokenly pro-union, such employee was, almost without exception, laid off. Herrerias denied the correctness of an affidavit which she had made in February 1955, in which she deposed that Duckworth had informed her on Monday (October 11, 1954) that the plant was going to one shift on Friday (October 15), that she would then be the day-shift floorlady, and that she should make up a list of which workers she wanted. In her affidavit, which she sought to discredit at the hearing, she quoted Duckworth as saying: "Pick out your best workers and get as many as possible who are non-union"—or words to that effect. He may have said to get rid of the pro-union people, or the 'trouble-makers' * * *". In her testimony, Herrerias said that Duckworth "only said to me to pick out my best workers and anybody that was given me trouble." Asked by Respondent's counsel if any employees had given her trouble, Herrerias answered "a few," but the only one she named as giving her trouble was Pauline Ploxa, who had had a fight with another girl and had to be separated from her. But Ploxa, as previously related herein, had given Herrerias reason to believe that she was not pro-union and it is significant that although she was the

only one whom Herrerias could name as a trouble-maker, other than in the sense of union advocate, Ploxa's name was on the list for retention after the layoff as read at the meeting of October 15, 1954. Even if Duckworth used the expression "trouble-makers" or those "who had given trouble," as she testified, instead of "pro-union employees" in instructing Herrerias whom to eliminate, I conclude that Herrerias correctly understood Duckworth to mean "outspoken union sympathizers," and I find that Herrerias made up her list accordingly to eliminate such employees.

If the Respondent had possession of the purloined list of union applicants before the supervisors met in the storeroom on the cannery balcony on October 14 to make up the list of employees to be retained, it would have been able to identify most of the union applicants. Some who had signed cards for the Union were not on the list, however, perhaps because they had either signed their pledge cards too recently or had signed at another plant and had not yet been transferred by the Union to the list of Respondent's employees. But even by the testimony of Erma Bate, who gave the list to Herrerias, she gave it to Herrerias on the night of October 14 after the retention list had apparently been made up by the Respondent. Of course, the list of those to be retained might have been altered before Friday afternoon, if the Respondent had received it before then and if it had desired to eliminate all known union advocates on the basis of the information given on the purloined list. But,

as previously stated, I do not rely on evidence that the purloined list was delivered to Herrerias on October 14 in drawing my conclusions. However, even if the Respondent had a list of union applicants, I would not expect that it would eliminate all of them. Such a course would not have been essential, wise, or even desirable from the Respondent's point of view. If the Respondent's purpose was to cause the Union to lose the election, it was not essential to lay off all union advocates—it was sufficient to lay off only enough to assure a majority vote against the Union; it would not have been wise to lay off all union employees because the lay-off would have been too obviously an anti-union move; and it would not have been desirable because some of those laid off would be numbered among the Respondent's best workers. Actually, 20 of the women and 2 of the men (of those still employed on October 14) whose names were on the purloined list were designated for retention, according to General Counsel's exhibit No. 36.⁵⁰ In all, 84 women employees, still employed on October 14, were named on the purloined list. The Respondent

⁵⁰ Two of these 20 women did not work continuously up to October 15 and did not return thereafter. One of the 20 women (Pate) was told her name was not supposed to be on the list and her employment was terminated on October 18, the day before the election. Most of the 20 had been hired early in the season, 14 of them in July 1954. This is not taken to mean that the Respondent was following strict seniority because 33 other employees who were hired just as early in the season were laid off.

therefore retained less than one-fourth of these. Only 5 men were named on the purloined list and 2 of these were retained. One of the 2 (Jose Garcia) had been employed since March 1954, before the season commenced. The other (Ray Panelli) had been employed on July 13, 1953, the season before and was the only truck driver shown on the employment list.

There were 27 women and 2 men named as on the Union's organizing committee. Of these, 4 women were listed for retention. Neither of the male committeemen was retained. One of the four women shown by General Counsel's exhibit 36 as expected to be retained was Gloria Pate, who was told on October 18 that she was not supposed to be on the list, and she was dismissed. Erna Bate, one of the women named as on the committee, but who delivered the purloined list to Herrerias, was not on the retention list but was re-employed on October 18.

Of the 17 women and 8 men who had signed union authorization cards (while employed by the Respondent) but whose names were not on the purloined union list, only 2 women (Elizabeth Augustine and Josephine Geist) and one man (Wayne Smith) were listed for retention. Five of the 17 women whose names were not on the purloined list had been hired in October.⁵¹ Three of the 15

⁵¹ The majority of the employees hired after October 2, the date of eligibility to vote in the union election, were laid off, although some of them were later re-employed.

women in this group who were laid off were, however, re-employed, one on October 18 (Edyth Wasin), one on October 20 (Oma Bridges) and one on October 28 (Julia Row). One of the 7 men in this group who had not been listed for retention, was nevertheless in the Respondent's employ on and after October 18 (Willy Augstin), and another man in this group was rehired on October 20 (Arthur Heflin). The latter had first been employed on October 4. Leonard Lee was one of the 7 in this group who was laid off. Both he and his wife were on the union committee. He had been employed on July 23, 1954, and he was not re-employed.

(1) Employees ineligible to vote.

As of October 14, 1954, there were 186 non-supervisory women and 67 non-supervisory men listed as on the payroll.⁵² In determining the effect of the layoff on the October 19 election, the employees hired after the date of eligibility to vote may be eliminated from consideration. Since 18 women and 3 men were hired after October 2 (the eligibility date), that many could not have voted anyway. But the statistics on even these are interest-

⁵² Although certain exhibits show a male employee named Fay Neel with a hiring date of June 7, 1954, the evidence shows that he did not work for the Respondent after July 31 until he was hired on October 16 as a watchman. Another employee, Henry Narron, was not on the retention list but he was given a job as watchman as of the night of October 15. Neel was not shown on the October 2 eligibility list. Narron was. I count Narron but not Neel among the 67.

ing, for of the 18 ineligible women, 12 were not listed for retention, but 6 were. Some of the 6 did not in fact work after October 15, probably, as in the case of Patricia Zimpher, because they could not work days. Of the 12 who were laid off, 7 had signed union cards, 5 had not. One of the latter 5 laid off had the same surname as a union applicant whose name was on the purloined list and who was laid off. Of the 6 women who had been hired after the eligibility date but who were listed for retention, 5 had not signed union cards while one had. None of the 3 ineligible men was on the retention list. But of the ineligibles who were laid off on October 15, 2 women and 2 men were again employed by the Respondent before October 25. Neither of the 2 women re-employed had signed a union card. Only one of the 2 men re-employed had signed a union card (Arthur Heflin), but his name was not on the purloined union list. The name of only one of the entire ineligible group appeared on the purloined union list (Lois Thornton). She was laid off and was not re-employed.

(2) Employees eligible to vote.

The number of employees eligible to vote on October 19 who were in the Respondent's employ as of October 14 was 168 women and 64 men. Of these, 97⁵³ women and 11 men had signed union cards. Of the eligible-voter group, 72 women and 37 men were listed for retention. Considering, first, the

⁵³ A few of these had signed their cards while elsewhere employed.

proportion of these who had signed union application cards, the evidence shows that of the 72 women listed for retention, 22 had signed union cards while in the Respondent's employ, 3 had signed earlier at other canneries, and 1 for whom no card was introduced in evidence was listed on the purloined union list and so is presumed to have signed a card. This makes a total of 26 women who had at some time evidenced approval of the Union who were to be retained. As against the 26 out of a total of 97 union-minded women (or approximately 28 per cent), 45 out of 72 non-union women (or about 72 percent) were listed for retention. There is evidence, however, that the Respondent's supervisors had reason to believe that some of those here counted among the union-minded women were actually non-union minded, and that some of those laid off who were in fact non-union were or may have been thought to be union minded. For example, Herrerias had been told by Ploxa that Mary Seidel was strong for the Union. Seidel did not sign a union pledge card, but she was among those not listed for retention. According to the witness, Ploxa, Herrerias believed that Clara Davello (who had signed a union pledge card) was anti-union. Davello was listed by the Respondent for retention. Herrerias had been given reason to believe that Ploxa and Rawles were non-union. Perhaps they were. But since they had signed pledge cards while working at the Co-op before their employment by the Respondent, I have classed them here as union minded. They were both listed by the Respondent

for retention. By Herrerias' own testimony, she believed Louise Chapson to be non-union minded until she saw her name on the purloined union list on Saturday, October 16. Chapson was listed by the Respondent for retention. On the basis of the Respondent's belief, therefore, the difference between the foregoing percentages would be increased.

Another instance of the influence of the Respondent's belief of the attitude of employees toward the Union on the continuance of their employment is illustrated by the following facts: Of those whose names were not listed for retention, several were nevertheless in the Respondent's employ at the time of the election on October 19 and must be presumed to have been rehired. The Respondent did not officially keep records of employee status or case histories. If an employee did not work for several days, for whatever reason, the Respondent might make a penciled notation, "Quit," but it did not state or attempt to state on its records the reason for or fact of termination otherwise. Even the notation "quit" was of a mere presumption which was disregarded if the employee returned. The personnel payroll records, therefore, did not show who had been laid off. There were 13 women and 5 men not on the retention list, not shown as rehired, but nevertheless shown by the Respondent as in its employ on October 19. Of the 13 women, 7 had not signed union pledge cards and 6 had. Of the 5 men, 1 had signed a union pledge card and 4 had not. Thus, 11 non-union and 6 union employees were, in effect reinstated or continued in employ

although not on the retention list. But, again, if the Respondent's basis for belief were taken into account, this difference would increase. The Respondent contended that it did not have the purloined union list in its possession until October 16, but even this date was before any of such reinstatements was made, and if the Respondent had relied on this list as evidence of identity of pro-union employees, only 1 of the 5 men and 4 of the 13 women so reinstated or retained would appear to have been pro-union. The names of the other 13 so reinstated did not appear on the purloined list. But one of the 4 women whose names were on the purloined list who was reinstated was Erma Bate, who had, herself, delivered the purloined list to Herrierias.⁵⁴

The General Counsel contends that the Respondent not only had the purloined union list on October 14, when it made up its retention list, but used it in its selection of employees so as to lay off a majority of union employees. If the purloined list had been so used, some of those on the purloined list were still retained as the following results indicate:

The total number of employees named on the purloined union list: Women 84, Men 5.

On Respondent's retention list of above number: Women 19,⁵⁵ Men 2.

⁵⁴ The other 3 were Ruth Clark, Pastoria Hall, and Etta Urton.

⁵⁵ This includes Gloria Pate, who was laid off on October 18, the day before the election.

However, I am not fully satisfied that the retention list, General Counsel's exhibit 36, was in fact, made up with the assistance of the purloined union list. I believe that the fact that the Respondent succeeded in laying off a much greater percentage of union than non-union employees may be attributable, to a large degree, to the fact that it made its selection of female employees to be retained mostly from the night shift. An exhaustive study of the evidence convinces me that the Respondent abandoned its past practice of laying off all the night-shift employees when terminating that shift in 1954 so that it could make a selection of a greater percentage of non-union employees for retention. This would have been feasible from the Respondent's point of view, first, because the greater percentage of the union employees was on the day shift and they could be identified by their union buttons and, second, because Herrerias, through her methods of surveillance, was in a good position to know who was and who was not for the Union on the night shift. The following figures⁵⁶ reveal the effect of the Respondent's selection:

⁵⁶ See Appendix A hereto attached for names and other data employed here.

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Number and Approximate Percentage of Employees Affected						
On Payroll October 14			On Retention List October 15			
Total			Total			
Number	Prounion	Nonunion	Number	Prounion	Nonunion	
W						
O Day	86	73	13	25	17	8
M						
E Night	82	23	59	46	9	37
N						
M Day	37	8	29	26	3	23
E						
N Night	27	3	24	11	0	11
T						
O	232	107	125	108	29	79
T						
A						
L						

From the foregoing it will be seen that the proportion of all non-union employees on the retention list in each case exceeds the proportion of all the union employees retained. The total result is a substantial proportionate increase in non-union employees. It is seen that almost twice as many women were selected for retention from the night shift as from the day shift, but the opposite is true of the men, for more than twice as many men were taken from the day shift as from the night shift. Such a pattern appears deliberately designed to affect the result of the union election.

The only two men on the union organizing committee were Clarence Storey, the day-shift dumper, and Leonard Lee, a day-shift stacker. No stackers were listed on the retention list. Salvador Chicano, the night-shift dumper, was retained. Although not listed for retention, Joe Bertoni, a night-shift stacker, apparently continued to work. Both Chi-

cano and Bertoni were non-union. Another stacker laid off was Arthur Heflin, hired too late to be eligible to vote in the union election on October 19. But immediately after the election Heflin was rehired. On the basis of seniority Storey had a few days more than Chicano. Lee had 2 months more than either Bertoni or Heflin. Although Heflin had signed a union pledge card about a week before the layoff, his name was not on the purloined union list and there is no evidence to indicate that the Respondent knew he was pro-union. Yet during the week after the layoff, between October 20 and 23, the Respondent hired six women, none of whom had previously been employed by the Respondent, and in the week after that, October 25 to 30, it hired four more women and one man none of whom had been employed before. Another new woman was hired on November 6.

Twenty-two of the employees whose names were not read on the retention list (excluding two watchmen) were either treated by the Respondent as retained or were rehired at some date between October 18 and 30. A twenty-third was out because of an accident and returned on November 8. Among the 22 were several students who worked only on weekends and two employees who had been out because of illness. Of the 22, 9 had signed union pledge cards before the layoff while 13 had not, but only 3 of the 9 were on the purloined union list and there is no evidence that the Respondent had reason to believe that the 6 who had signed pledge cards but whose names were not on the purloined union list (which Superintendent Duckworth admittedly

had possession of before any of these were rehired) were pro-union.

The method used by the Respondent in making its selection of employees for retention and the result effected of retaining a greater proportion of non-union employees, in the background of the anti-union attitude of the Respondent, evidences a clearly designed, discriminatory selection of employees for retention.⁵⁷

Although the Respondent claimed that the selection of employees was made by picking the best workers, its evidence of what kinds of things were taken into account were not shown except in a few cases where criticism of one or two of those laid off was made or where a few retained were described as good workers.⁵⁸ But even in such instances, it appeared to me that the strongest criticism had its source in anti-union bias. This was especially noticeable in the case of Clarence Storey, who was a fast worker and appears to have been deemed a good worker until he became active in the Union's organizational drive. The only material criticism made by the Respondent before Martini warned

⁵⁷ *Montgomery Ward & Co. v. N. L. R. B.*, 107 F. 2d 555 (C. A. 7); *Wright & McGill Co.*, 102 NLRB 1035; *Carolina Mills, Inc.*, 92 NLRB 1141, enf'd 190 F. 2d 675 (C. A. 4); *W. C. Nabors Company*, 89 NLRB 538, enf'd 196 F. 2d 272 (C. A. 5); *Granite State Machine Company*, 80 NLRB 79, 99; *Differential Steel Car Company*, 75 NLRB 714, enf'd 179 F. 2d 241 (C. A. 6); *Sandy Hill Iron & Brass Works*, 69 NLRB 355, enf'd 165 F. 2d 660 (C. A. 2).

⁵⁸ See *E. H. Moore, Inc.*, 40 NLRB 1058, 1075, 1077.

him against talking about the Union on employer's time was that he sometimes dumped so fast that he got more than enough apples in the flume, with the result that the water in the flume would run over onto the feet of the women on the peeler line, and, according to Respondent's evidence, he was on a few occasions asked to slow down. He was never criticized for dumping too slowly. Sometimes, after filling the flume, Storey would take a moment's break and go for a drink. Duckworth testified that several times during the season he had warned Storey against leaving his post. Storey denied this and I credit his denial. Criticism of his leaving his post, I am convinced, was not made until the Respondent had reason to believe that Storey was active on behalf of the Union. After that, as I view the evidence, the Respondent appeared to be suspicious of him every time he was away from his post, even if he went only to tell the forklift operator to bring him more apples. If Storey was warned about leaving his post for any reason, it was not until September 25 when his wife was discharged. Absent anti-union bias, it seems improbable that Storey would have been laid off. No comparison of working abilities of Storey, the day-shift dumper, and Chicano, the night-shift dumper, was offered. Whether or not Chicano was related to Virginia Chicano, whose name will be mentioned hereinafter, is not certain.

Most of the women's jobs were interchangeable, no special skill being required. Perhaps speed and thoroughness could differentiate some women from others, but there was no evidence to identify em-

ployees by such criteria, and as Hardin, who had been the day-shift floorlady, was not asked for an opinion of the women on the day shift, the inference is that such criteria were not used.

I conclude and find, on all the evidence, that, regardless of whether or not a layoff on October 15 might have been justified on economic grounds, the Respondent's selection of employees to be laid off or retained was discriminatory.

I also find evidence of discrimination in rehiring after the layoff. Although Martini told several of the women who had been laid off and were seeking re-employment that they should leave their names, addresses and telephone numbers and that, if a vacancy arose, they would be called, they were not rehired. Yet between October 20 and November 6, 1954, the Respondent hired twelve new women and one new man. Martini had personally taken the name of Marie Tripp on October 19, right after the election, but she was not recalled. Mary Russell and Lila Layman applied for work between October 26 and November 3 and Martini took their names, too, but they were not recalled, although one or two vacancies must have arisen thereafter for two new women were hired, one October 27 and one on November 6. All the new female employees were hired as trimmers, jobs for which those laid off were qualified. Further data on hiring and rehiring will be set forth hereafter in connection with the discharge of Gloria Pate.

F. The new application form

In the course of the hearing, the General Counsel,

upon motion granted, amended his complaint by adding as an allegation of the violation of Section 8 (a) (1) of the Act, the adoption by the Respondent, before the commencement of the 1955 season, of a new form of application blank for use by applicants for employment. Before 1955, the Respondent had used a very short form of application blank, asking for name, address, name of spouse, social security number, sex, date of birth, name and address and telephone number of person to notify in case of accident, that person's relationship, a line for signature, a couple of lines for "Reason for leaving" and "Recommendation." This was all contained on a half page of approximately $5\frac{1}{2} \times 8\frac{1}{2}$ inches. The new form covered both sides of a full-sized sheet measuring about $8\frac{1}{2} \times 10\frac{1}{2}$ inches. The new questionnaire calls for detailed information about the applicant and his educational and employment history. From the nature of the detailed information sought, as well as the fact that it asks for the expected salary and the applicant's salary in past positions, I conclude that the form was originally designed for use by applicants for permanent salaried positions rather than for seasonal, wage-paying, manual jobs. Among the questions is:

25. To [sic] what Trade, Professional or other organizations are you a member: (Do not name any organization which would reveal your race, religion, color, or ancestral origin.)

At the conclusion of the form, the applicant is required to agree to abide by all present and subsequently issued rules of the company, to authorize

past employers to furnish all information "they may have concerning" the applicant, to authorize an investigation of all statements in the application, and to "understand" that, in the event of his employment, he will be subject to dismissal if any of the information given is false or if he has failed to give any material information requested. Martini testified that he adopted the new form after he had remarked in May 1955 at an apple industry meeting that he was about out of employment application forms and was considering having a new form printed which would be "a little more complete," and after a later meeting, when W. M. Caldwell, of the California Association of Employers, informed him of a form that was used "generally throughout the industry."

When such a form is used for the purpose for which it appears to be designed, i.e. by applicants for salaried positions, question 25 of the application form could be relevant and would not be likely to be thought to call for union affiliations. But applicants for hourly paid manual work would not be likely to belong to the same type of trade or professional organizations as salaried workers. To the type of worker employed by the Respondent, the question could easily be interpreted as asking for union affiliation, especially since union affiliation is not specifically excluded in the parenthetical statement under the question. The Respondent did not explain why it would wish to know about the trade or professional organizations to which a future apple dumper or peeler, for example, belonged.

There is no evidence that the Respondent took special steps to see that this question was either answered or left unanswered, but in view of the penalty of discharge suggested (at the close of the form) for failing to give material information requested, it must be assumed that the Respondent expected the question to be answered. Perhaps, standing by itself, the use of such a questionnaire by an employer who had no anti-union background would not suffice to establish interference, restraint, or coercion. Indeed, it has been held that use of such a form, standing by itself, is not a basis for a finding of an unfair labor practice.⁵⁹ But although the use of a questionnaire containing a question about union membership may not be per se interference, restraint, and coercion prohibited by provisions of Section 8 (a) (1) of the Act, such practice may take on a coercive character in a background of hostility to a union. As stated by the Court in *N. L. R. B. v. Syracuse Color Press Inc.*⁶⁰

The type of interrogation here finds no specific authorization in the provisions of Section 8 (c) of the Act. It is afforded constitutional protection only to the point that it is free from the character of coercion * * * When that limit is passed, jurisdictional precedents are unanimous that a violation of Section 8 (a) (1) may be found.

Here, the time, the place, the personnel involved,

⁵⁹ *N. L. R. B. v. Ozark Dam Construction*, 190 F. 2d 222, 227 (C. A. 8).

⁶⁰ 209 F. 2d 596 (C. A. 2), cert. den. 347 U. S. 966.

the information sought, and the employer's conceded preference, all must be considered in determining whether or not the actual or likely effect of the interrogations upon the employees constitutes interference, restraint or coercion.

The mere fact that the question which may call for an answer concerning union membership does not include the words "union membership" or the equivalent does not absolve the employer from coercive influence of the question if an employee might reasonably be expected to disclose his union membership in answer to the question.⁶¹ Evidence in the record indicates that the application form put to use in 1955 by the Respondent was used by a number of other employers as well. Such evidence does not, however, justify its use by the Respondent on the facts here present. For all that appears, the other employers may use it for the purpose for which it was obviously intended — applicants for salaried positions, where, standing by itself, it would not be so likely to be interpreted to call for revelation of union membership, especially in the absence of a background of hostility toward a union. But in the background here, which is not only hostile to the Union but contains concrete proof that the Respondent was disposed to discriminate against union advocates, the constraint imposed (upon both applicants for employment and employees alike who have good cause to believe that

⁶¹ Centennial Cotton Gin Company, 90 NLRB 345, aff'd, 193 F. 2d 502 (C. A. 5).

the Respondent has such hostility and discriminating disposition) by a question concerning organizational membership is apparent. In a case such as this, it suffices that the question has such effect or tendency, without a finding that the Respondent specifically intended to produce such effect. But considering the failure of the Respondent to re-employ such employees as Pate, Tripp, Russell, and Layman, among others, who it knew were pro-union, before giving employment to new employees as it did, the evidence of the Respondent's disposition and effort to avoid a union majority, the generally hostile attitude of the Respondent toward the Union, and the lack of any other reasonable explanation for adopting an application form which was not apparently needed and certainly was not designed for the type of employees for which it was put to use, I believe that an inference is warranted that the Respondent here used such form for coercive purposes, with the expectation that applicants would reveal their union membership. I find, therefore, that by the use of such application form, the Respondent interfered with, restrained, and coerced its employees and applicants for employment in the exercise of the rights guaranteed in Section 7 of the Act.

G. Discriminatory Discharges

1. Orice Storey

First employed in September 1953, Orice Storey worked until the end of that season. Just before the end of the season, the floorlady told Storey, along

with the other women that she would like to have her back the next season. About July 1, 1954, the Respondent sent post cards notices to its 1953 employees asking them if they intended to return and if so to report on July 9 to receive assignments. Storey received such a card and reported on that day, filling out certain forms. She started working on July 16. Her floorlady, Edna Hardin, who was not in the employ of the Respondent at the time of the hearing, testified that early in the season Storey was sorting apples but because she was a fast trimmer she was brought inside and put on the trim line.

On August 4, as previously related, Superintendent Duckworth and Foreman Williams spoke to Storey and her husband as they were driving out of the parking lot and handed them blank application cards for the Union with the suggestion that they throw the cards at the union organizer. Instead of following the suggestion, Storey and her husband signed the cards and mailed them to the Union.

Storey and her husband were put on the day-shift organizing committee by a union representative, and Storey thereafter passed out pledge cards in and about the cannery to other employees during the lunch time and before and after work. The organizing committee held meetings and reported to the union representative the number of cards passed out and the progress of organization.

On one occasion early in the season, as previously related, Storey invited Floorlady Hardin to a union meeting. Hardin refused, Storey quoted her as say-

ing that she would like to but that if she did there would be too much "yak, yak."

On about September 23 the incident occurred which was previously related. At a suggestion from a union representative speaking over an amplifier from a truck on the highway, Storey got some other women together and went to the cannery to ask Martini, who was then in the cannery office,⁶² to agree to an immediate election, instead of waiting for a Board ordered one.⁶³ The incident which followed, and which has already been related, delayed the commencement of work a few minutes after the regular noon hour. Storey testified that when the 12 o'clock whistle blew, there was a rush to the time clock and some of the women had started back to their work positions before Martini came down. She testified that she, herself, was on her way to her position and turned back to speak with Martini when he came down from the cannery office. Her time card was punched at 12:02 p.m. that day.

Later that afternoon Martini summoned Storey and another woman to the office and spoke with them for about 50 minutes. In this conversation Martini warned them not to talk union within the cannery proper, but he did not limit the prohibition

⁶² This was the office used principally by Duckworth, although it was available to other supervisors. The Respondent's main office was at one end of the cold-storage building porch.

⁶³ The representation hearing had been held on September 19. The Board order that an election be held was issued on October 4, but the date was not fixed until later.

to working time and he promulgated no general rule.

On Saturday, September 25, 1954, the day shift worked from 7 a.m. until noon. Storey had a cold on Friday, September 24, and Saturday, September 25, but she worked most of the time, occasionally asking Floorlady Hardin for aspirin. On Friday afternoon, Hardin sent Storey to the women's lounge.⁶⁴ On Saturday Storey asked Hardin for aspirin at about 11 a.m. Later, according to Hardin, Storey said that the aspirin did not help and that she would like to check out and go to her car. Hardin consented. Storey punched out at 11:24 a.m. and, according to her testimony, when she got to the car, it was so hot [from the sun] that she rolled the windows down, opened a door and walked back to the cannery to wait for the car to cool off. She stood inside the cannery door near the time clock. She testified that she did not go to the women's lounge because the night shift women were arriving and, when she looked in, she saw that the lounge was full of night-shift women.

Although there was supposed to be a rule that employees were not to congregate inside the cannery when waiting for the change of shifts, the rule appears not to have been enforced except early in the

⁶⁴ Storey testified that this was at about 3 p.m. and that she was there until work stopped because of a breakdown. But her time card shows that she punched out that afternoon at 1:44 o'clock. Her husband punched out at 1:42 p.m. I deduce that if she went to the lounge, it was before she punched out.

season, for there is ample evidence that a number of night-shift women usually waited near the time clock until time to start the night shift. While standing near the time clock, Storey conversed with a few of the women sitting on one of the benches near the door to the women's lounge. Storey testified that they called her over to ask her the time and place of the union meeting the next week. Storey told them and invited them to come. Another woman said she had heard that Storey was on the union committee and asked how she could get on it. Storey told her to call Angelo Bertolucci. The woman then told Storey that Martini, who was on the balcony, was looking at them.

A number of witnesses testified concerning what occurred following the foregoing, which was based on Storey's testimony, as she was the sole witness as to what occurred near the time clock up to that point. As there is some conflict as to what occurred next, I have pieced the story together from the testimony of several witnesses, using such portions as appeared to be based on reliable memory. Storey testified that, at this point, a night-shift employee by the name of Virginia Chicano sat down near where Storey was standing, asked how the Union was going and engaged Storey in a brief conversation.⁶⁵ At about this time, Martini sent Superin-

⁶⁵ Chicano testified that Storey solicited her to join the Union, but I find that Chicano confused the above conversation with one she had with Storey after the latter's discharge. In 1955 Chicano was made an assistant floorlady.

tendent Duckworth down to learn what Storey was doing where she was. Duckworth went down and reported back that Storey had checked out ill. Martini told Duckworth to see if Storey had punched out. Duckworth got the attention of Floorlady Hardin and motioned her over. Hardin came to the stairs leading to the balcony that runs outside of the cannery office and laboratory. Duckworth met her on the stairs and asked her if Storey had checked out. Hardin said she would check Storey's time card. She went to the rack and looked at the card and told Duckworth, who had followed her, that Storey had punched out. Duckworth went back and reported this to Martini who told Duckworth to ask Storey to leave. Chicano went upstairs and told Duckworth that Storey had asked her to join the Union.⁶⁶ Duckworth went down again and told Storey to wait outside. Storey asked why and if she was in the way. Duckworth said she definitely was in the way and again asked her to go outside. Storey said it was pretty hot outside. Duckworth went back to the balcony and told Martini that Storey would not leave. Martini told him to go down and see that she left and never came back.⁶⁷

⁶⁶ A comparison of the testimony of Duckworth and Chicano on this incident indicates some elaboration by Duckworth. Storey testified convincingly on rebuttal that she had not asked Chicano to join the Union until after her discharge although she admitted that on the occasion above related she had talked to Chicano about the Union.

⁶⁷ This last finding is based on Martini's testimony. Duckworth testified that Martini told him to discharge Storey.

Duckworth again returned and told Storey more emphatically to leave.⁶⁸ She left by the back door and waited in the car for her husband to finish his shift. As Storey's husband worked just outside the back door, on the south side of the building, I infer that she passed that way to let him know what had happened.

Shortly after Storey left, Martini and Duckworth went out the same door by which Storey had left, and Martini called her husband, Clarence, out to a point about 25 feet from his post and asked if he knew what his wife was doing. Martini and Clarence Storey gave different versions of the ensuing conversation. Each will be given before making findings of fact. According to the account of Clarence Storey, when he replied that he did not know, Martini said she was trying to form a committee on the night shift and that he wanted Clarence to go fire his wife, "get her out of here." Clarence replied that that was Martini's job, that if he wanted to fire her that was for him to do. Duckworth came then and said that he had two witnesses that she was trying to form a committee on the night shift. Just then Chairman Bondi came and said that if Duckworth had two witnesses that was enough, that he would sign her check. Clarence told Martini that his wife had punched out and was on her own time and that "you told us two days ago that we could do what we

⁶⁸ Duckworth testified that he discharged her, but he did not say what words he used. He apparently did not give Storey the impression at that time that he had discharged her.

wanted on our own time." He quoted Martini as saying, "I forbid talking union on cannery property, on cannery property," and also as saying "Why don't they get their committees and get it over with . . . You know I am the boss, I am the manager, I run this cannery. Why in the . . . don't you get Bertolucci and Rhodes to shut the place down."

According to Martini's account, he told Clarence Storey that he had just discharged his wife and that the next time he had a complaint from any one of "my people" that Clarence Storey had left his post, he would fire him also, "and I walked away." Martini and Duckworth denied that the conversation was as quoted by Clarence Storey, but Duckworth testified that Martini did use strong language. Martini, Duckworth and Bondi all denied that Bondi was present. Bondi testified that Duckworth came to him just outside the office and asked him to sign the check for Orice Storey because Martini had left. He did so.

I infer, that, although Duckworth told Clarence Storey at about 11:55 a.m. that he would have his wife's pay ready for her in a short while, the Storeys did not wait for it that day but got the check on Monday. Clarence Storey told his wife that he "guessed they fired" her. Later, Orice Storey called Floorlady Hardin to ask if she had been discharged. Hardin replied that she did not know, but that Duckworth had removed Storey's card from the rack.

With respect to the conflict in the evidence, I conclude that the conversation between Clarence Storey and Martini was one accompanied by considerable emotion and that the speed with which words flew and actions occurred would make it difficult to remember the order in which words were spoken or movements occurred as well as difficult to remember the exact words spoken, but I find that, in substance, Martini did speak substantially as quoted by Clarence Storey although Martini no doubt added a warning to Clarence Storey as he testified. Bondi was in the environs at the time of the incident but I am inclined to believe that Bondi did not make the statement about two witnesses being enough. On the other hand, I do not believe Storey's testimony of this was a fabrication. He no doubt saw Bondi in the yard at about the time mentioned and, by a vagary of memory attributed to Bondi words that he heard spoken, probably by Martini since it was to him that Duckworth said he had two witnesses.

Orice Storey returned to the plant on October 18 with Marjorie Byrd, an employee who had been laid off on October 15. Clarence came and joined them, and they approached Martini, who was standing between the cannery and the warehouse with the superintendent of the packinghouse, identified only as Loui. Orice Storey spoke to Martini asking if she had been discharged. As Clarence Storey had already been given his wife's pay check, I infer that she knew the answer to her own question and that her question was asked merely as an introduction to her succeeding questions. There is a conflict

as to what was said in the ensuing conversation. Orice Storey testified that Martini answered, "Yes, Ma'am, you are fired and that's final," that she asked if her work had been satisfactory, and Martini said, "Yes, you were a good worker, but I cannot have you talking up this union thing and agitating among the other girls and forming committees . . . You are fired and that's final and your husband has your check," that she asked if Martini knew she was on the committee from the day shift, and that Martini replied "he didn't give a damn what committee I was on," and that he then added again, "You are fired and that's final," and that Martini then walked away. Martini testified that Orice Storey merely asked why she was discharged and that he told her she knew why and walked away. He denied Storey's testimony quoting him as saying that he couldn't have her talking up this union thing and agitating and that he "didn't give a damn what committee she was on." Martini testified that he did not recall that Byrd was present, but he did not testify with respect to the packing shed superintendent's presence. Clarence Storey and Byrd gave credible accounts that Orice Storey asked Martini if she was discharged, that Martini answered, "Yes," that Orice Storey asked why, and that Martini said "for trying to form a committee on the night shift." Clarence Storey also corroborated his wife on her testimony regarding her question as to whether Martini knew that she was on the committee and Martini's reply. There was, however, enough difference in the testimony of Byrd and the two Storey's to convince me

that they were testifying on the basis of their own memories.

Although the explanation does not appear to have been advanced before the hearing, the Respondent, at the hearing, justified the discharge of Orice Storey on the ground that Storey had gathered a group of women to talk to in a dangerous location because a fork lift was operating in that locality, raising heavy tanks.

The first time Martini was on the witness stand he gave as the reason for Storey's discharge that Storey called together a congregation of women and stood in an alleyway and that he had told her on a previous occasion (September 22, the day he spoke to Storey and Layman in the cannery office about union talk in the cannery) that he wanted no more occurrences of that, and that since she had done it again, he discharged her. In his testimony of his conversation with Storey and Layman on September 22, Martini did say that he told Storey that he "did not want another occurrence, such occurrence as had just happened that day . . ." but explained the "occurrence" that he had reference to as "that group of women she had there, when she called me down and told me they were going to walk out if I didn't meet with the Union officials." He did not testify that, in his conversation with Storey and Layman, he warned them of any danger and neither did they. At another point, while still testifying as a witness called by the General Counsel under section 43b of the Federal Rules of Civil Procedure, Martini testified that he called Storey in (on Sep-

tember 22) "to tell her about the incident downstairs, where she had a group of people there, and I told her I didn't want her to do it in the plant." He did not exclude the area under the balcony or any other locality in the plant where the fork lift would not be operating. He did not limit the time to the time when the plant was operating. Even if the fork lift had been operating at the end of the lunch period on September 22 and a hazard had existed on that occasion,⁶⁹ I am not satisfied that they had anything to do with Storey's discharge, for I do not believe that Martini really thought that Storey had "gathered" the women around her on September 25 just before she was discharged. Martini reluctantly admitted that he had seen women sitting or standing in the area near the time clock but testified that he did not know if they were going off shift or on. He may not have known it, but he most likely believed that they or most of them were night shift women. There is considerable evidence that it was a practice for about 10 or 12 night shift women to stand or sit near the time clock before the change of shift. I am satisfied and find that Martini was

⁶⁹ The only witness who appeared to me to have definite recollection of the fork-lift that noon was Lila Layman, who testified that it went through the door while they were there and that they had to get out of the way. But she did not say, and was not asked, if the fork lift was going in or out of the door or whether or not it was carrying any kind of load. The operator may have been just going to lunch for all that appears. Martini testified that nothing heavy was over the heads of the women where they were standing.

not ignorant of the practice, and that he did believe Storey was speaking with night shift women. This is evident from what Martini later told Clarence Storey. Furthermore, the evidence of Martini's annoyance with Storey for her organizational activities and all the other evidence leading up to Storey's discharge justifies the conclusion that Martini did not really believe Storey had, herself, congregated that group of night-shift women near the time clock on September 25. And if he had thought that any danger arose from their being where they were, the natural and logical thing for him to do would have been to ask Duckworth to remove all the women. But there is no evidence that he did so. In fact, the evidence indicates that it was only Storey that he asked Duckworth to send out. Perhaps a reason not involving union activity might have existed to justify a request that only Storey leave, but if there was one, I am convinced that it was not the one which motivated Martini either in causing Storey to be sent from the building or in discharging her. The fact that Storey might have been feigning illness in order to leave work and organize night-shift employees was not relied on by Martini or the Respondent as a justification for her discharge either at the time of her discharge or thereafter.⁷⁰ All the evidence leads to the conclusion that Martini was concerned only with the fact that union talk

⁷⁰ As this was not relied upon, I do not feel called upon to decide whether or not the Respondent might have been justified in discharging Storey for such a reason.

was going on in the cannery building after he had told Storey that he prohibited that, without limiting the prohibition to working time. That Martini knew the night-shift employees with whom Storey was speaking were not yet on duty and that he ascertained that Storey herself had punched out before he discharged her establishes the fact that he believed he could at all times prohibit union talk in the building, whether or not the employees were on duty.

Two women who were in the Respondent's employ on September 25, Joanne Chames Schwartz and Eloyce McPhee Mounger⁷¹ testified that on the day Orice Storey was discharged, they were in the Respondent's main office for some purpose which they could not remember and, according to Mounger, while they were there, Martini entered in a rush, slammed the door and, walking toward one of the men in the office, screamed, "That damn Storey woman . . . she's always talking about the Union . . . I am going to get rid of her . . . I'd rather see the place closed down than see it go union." Schwartz's account varied slightly but she, too, quoted Martini as saying that he was going to get rid of Storey because she talked too much about the Union. Schwartz testified that 10 minutes after the foregoing incident, she asked Floorlady Hardin in the cannery if Storey had been discharged and that Hardin had told her she had, that when Schwartz

⁷¹ Before the time they testified each had been married. The middle names shown above are their maiden names.

asked why, Hardin replied that they could not "have that kind of people around that talk about the Union all the time." According to Hardin, Schwartz (whom she called Chames) came to her on September 25, while she was checking time cards at the rack and said that she and McPhee (Mounger) had been in the office and had heard something about Mrs. Storey being discharged and asked her (Hardin) if Storey had been discharged and that she (Hardin) replied that Storey must have been discharged because her card was missing from the rack. Hardin denied making the last statement quoted by Chames above but testified that Chames kept on talking after she told her that Storey's card was missing, but that she was busy and did not notice and did not recall saying any more. As Hardin had no part in discharging Storey, I do not deem it important to make a finding on the single conflict. Because Mounger and Schwartz were vague about the reason for their presence in the main office, I questioned them some about the time and the reason for their presence. On consideration of the entire record, however, I find that their inability to recall the reason for being there does not impair their credibility and I find that they gave a substantially accurate account of what Martini said.

On all the evidence, I conclude and find that Orice Storey was discharged because of her activities on behalf of the Union, activities which were protected under Section 7 of the Act, in violation of Section 8 (a) (3) of the Act.

2. Discharge of Gloria Pate

Gloria Pate was employed by the Respondent on July 15, 1954.⁷² Despite the advice of Superintendent Beavers, late in July, as previously related, she signed a union pledge card on August 4 and was on the day-shift committee for the Union. According to Pate, Beavers told her in the same conversation that "they" (which I take to be the Respondent's management) had asked him if Pate had anything to do with the Union (inferentially at her former place of employment where she had been active on behalf of the Union) and that he had told them she had not, because he did not want her to lose her job. It does not appear whether or not this had anything to do with the fact that Pate's name was on the retention list as read on October 15. I infer that it did not, because Floorlady Hardin reported to Superintendent Duckworth, when union talk first started, that Pate, among several that she named, was an agitator for the Union. Furthermore, Martini must have been aware of Pate's attitude toward the Union because he had spoken to Pate and her friend Lindsay about it on several occasions, as previously related.

At the meeting in the warehouse when the layoff was announced, Pate heard her own name read but did not hear that of her friend, Gloria Lindsay, who was out sick that day. This testimony conforms to

⁷² For convenience I use the name she went by while employed. She testified under her married name, DeFont.

the retention list in evidence, General Counsel's exhibit 36, which I have found to be the list actually read at that meeting, and with the testimony of Mary Castino.

On Monday, October 18, the next working day, Pate came to work in her working clothes, punched her time card, donned her apron and gloves, and went to her station. Pate testified that she was wearing several union buttons in plain view. About 10 minutes after she had started to work, Foreman Williams approached her and asked her what she was doing there. When she told him she was working, he told her she was not supposed to be there. Williams testified that he did this because Herrerias had told him Pate was not on the list to be working. Pate told Williams (as Pate testified) that her name was on the list to report to work and (as Williams testified) that she had a time card and had punched in. Williams disputed her statement that she was on the list and said he would check. He went up to the cannery office to look at the list and, on coming down, stopped to speak with Superintendent Duckworth. From this point, Pate's and Williams' testimony were in conflict. Because Pate's testimony is more consistent with facts and logical inferences, I credit her testimony and find that Williams returned to her and told Pate he was sorry, that her name was on the list but that it was a mistake and she would have to go home. Pate told Williams that, if she punched out and went home, the Respondent

would have to pay her for reporting to work. Williams said they would pay her for 2 hours.⁷³

Pate then went to the main plant office (attached to the cold storage building) and asked if Martini had come in yet. Told he had not, she telephoned her friend, Gloria Lindsay, to come for her because Lindsay, who had been told by Pate that she had been laid off, was not working and had borrowed Pate's car. Then Pate waited for Martini and when he came, she told him that she had been laid off and asked why.⁷⁴ Martini said he did not know and asked if her name was on the retention list. She said it was and that she came to work and had been told they had made a mistake and she told Martini that they were hiring other people "right now." Martini said he had nothing to do with the list and that the Respondent was laying off in accordance with seniority. Pate told him that people who had worked there for 3 or 4 years had been laid off. Martini

⁷³ Williams testified that, when he looked, he did not find Pate's name on the list and did not find a time card for her, that he so told Pate and that when Pate had said he would have to pay her for a couple of hours he told her that she would have to take that up with management. I do not credit this testimony insofar as it differs from Pate's.

⁷⁴ Lindsay, who arrived at about the same time, attempted to testify about the conversation. Because she was not present at the layoff meeting and thought that the names read there were names of people laid off rather than people retained, she became confused as to whether Pate had said her name was or was not on the list, and I disregard her testimony.

said that earlier years did not count, that it was just the current year that counted. Pate said that she had come to work on the first day⁷⁵ that year. According to Pate, Martini said, "I don't know, I just don't know." Martini denied that the conversation was as related by Pate and testified that she just said she had been laid off and needed the money, that he told her he had nothing to do with the list and that she should apply at the office and there might be a vacancy and she could get back on a later time.⁷⁶ Although Martini may have made such statements also, I find that the conversation occurred substantially as testified by Pate. Errol Wilson, the Respondent's accountant, testified that he had a conversation with Pate on Friday, October 15, right after the layoff meeting, in which he quoted her as asking him why she was laid off. Wilson testified that he told her he had nothing to do with the list and that she should see Superintendent Duckworth. Wilson appeared sure of parts of his testimony about this but not of other parts. It is con-

⁷⁵ A skeleton crew had worked earlier than July 15, 1954, the date of Pate's hiring but very few production employees (as of October 15) had an earlier employment date. I infer that production started on July 15, 1954.

⁷⁶ Such promises had been made to other laid off employees as well, including Marie Tripp, but, although the Respondent, between October 20 and November 6, hired 12 women and 1 man who had not previously been employed by the Respondent, it did not recall Pate or Tripp. Martini had, himself, taken Tripp's name and address for such purpose.

ceivable that he was present when Pate spoke with Martini on Monday or that she spoke with him on Monday while waiting for Martin. I am convinced that Wilson was mistaken about the date of such a conversation. If it occurred at all, I believe, it must have been on October 18. Mary Castino, an employee retained at the time of the layoff, testified that she heard Pate's name read at the layoff meeting, and that she left the meeting with Pate, was with her until they went to their respective cars in the parking lot, and at no time saw Wilson, and that Wilson did not speak to either of them. Castino's appearance, demeanor, and manner of testifying impressed me very favorably and I credit her testimony. Pate also denied having spoken to Wilson on October 15 after the layoff meeting. Pate's testimony throughout was given in a forthright manner, inconsistent with fabrication or concealment, and I credit her denial that she spoke with Wilson at that time.

Some time following the date of the election, Pate telephoned about her pay for Monday, October 18, and the Respondent mailed her a check for 2 hours' pay.

In drawing conclusions as to the reason for the termination of employment of Gloria Pate (Defont), I have considered the fact that, from October 16 to 19, 1954, the purloined union list was in the possession of Superintendent Duckworth. Pate's name was on that list. Although I believe that the Respondent was fully aware of Pate's union advocacy before the date of the layoff, it is certain that if the Respondent had had any doubt of her union affiliation before

time, it had none at the time of Pate's termination on October 18.

Erma Bate, who delivered the purloined union list to Herrerias, I have already found was re-employed on October 18. In addition to Bate a number of others were shown to have been re-employed on that date. In a list furnished by the Respondent to the Board before the hearing (General Counsel's exhibit 42), the Respondent listed the following employees as rehired on October 18: Mary Caddell,⁷⁷ Cornelia (Connie) Jones⁷⁸ Stella Vessels, Theresa

⁷⁷ Caddell's name was on the retention list. Even the retention list offered by the Respondent contained her name. No attempt was made to explain why she was shown as re-employed on October 18. Caddell, one of the women who had come to the Respondent after having been laid off temporarily at the Co-op, testified that a few days after the October 15 layoff she told Herrerias that she had heard rumors that all who signed pledge cards were laid off and that she wanted Herrerias to know that she had signed one, and that if it made any difference, perhaps there was a mistake in her being there. She quoted Herrerias as replying that Caddell had nothing to worry about, that she did not know who signed pledge cards, and that it made no difference to her whether or not Caddell was "union or not union," that she kept her girls from the way they worked. Obviously, part of Herrerias' statement to Caddell was untrue, since Herrerias at that time did know who had signed pledge cards. Caddell may be assumed not to have continued her interest in the Union since she worked during the 1955 season even after the Union had posted a picket line.

⁷⁸ Jones' name was on the retention list introduced in evidence by the General Counsel but not on that introduced by the Respondent. Jones had been employed first on October 4, 1954, after the eligibility date.

Hofland, Edith Wasin, and Etta Urton. Employment dates of these women are as follows: Caddell, September 13; Jones, October 4; Vessels, September 17; Hofland, September 13; Wasin, August 9; Urton, July 20. All of these except Urton were shown to have the job classification of "trimmers." Urton's job was classified as "inspection," the same as Pate's. Urton's time card for October 18 shows that she started work at 10 a.m., almost 2 hours after Pate was released, but she was nevertheless paid for a full day. One might infer that Urton was rehired to take Pate's place. But in the testimony of several witnesses, the inspectors who were working in the week after the layoff were named, and Urton was not named as one of them. Because of this and because of the evidence that none of the women's jobs involved special skill and that women could be transferred from one job to another, the inference is that Urton was not given work as an inspector and did not replace Pate. The Respondent did not offer any excuse for not using Pate on another job. Of the six women just named, only the names of Caddell and Urton appeared on the purloined union list. Although Urton had, on August 19, 1954, signed a pledge card for the Union, she was not, like Pate, on the union committee, and presumably, was not as active as Pate in the Union. Her personnel payroll record shows that she worked many short weeks.

Of the other 26 women named as on the union committee in addition to Pate, the only ones re-

tained or re-employed were Erma Bate, who had delivered the purloined union list to Herrerias, Mary Castino and Clara Davello, both inspectors, Ruthie Deal, and Ernestine Hack.⁷⁹

I have previously stated that, in addition to those shown as rehired on the exhibit just referred to (General Counsel's exhibit 42e), the evidence shows that a number of employees whose names were not on that exhibit were employed, although their names were not on the retention list heretofore found to be a copy of the one read at the layoff meeting. Some in this category with their employment dates are: Marcia Freyling, July 22; Pastoria Hall, July 20; Renee Napier, October 1; Catherine Perry, August 2; Sylvia Peterson, July 19; Jessie Smith, Sep-

⁷⁹ Bate, Castino, Davello, and Hack had worked on the night shift. Each has been mentioned previously herein. There is no clear evidence that they, or any of them, were known by Herrerias to be union organizers or advocates before the layoff list was prepared. Evidence on Deal's employment record shows some conflicts. According to Gloria Pate (De-Font), Gloria Lindsay and Deal were with her while she was speaking with Martini. Documents prepared by the Respondent but offered in evidence by the General Counsel present confusing information. One exhibit (G. C. 42e) shows Deal as last having worked on October 15 and as being rehired on October 23. Another exhibit (GC 40) shows her as having last worked on October 18 and quit. One exhibit (GC 40g), which is a list of employees as of October 19, does not contain Deal's name. One exhibit (GC 19) indicates that Deal was stated by the Respondent to have been absent for 2 days with Respondent's permission. Deal's ballot at the union election was challenged by the Respondent but the challenge was later withdrawn.

Hofland, Edith Wasin, and Etta Urton. Employment dates of these women are as follows: Caddell, September 13; Jones, October 4; Vessels, September 17; Hofland, September 13; Wasin, August 9; Urton, July 20. All of these except Urton were shown to have the job classification of "trimmers." Urton's job was classified as "inspection," the same as Pate's. Urton's time card for October 18 shows that she started work at 10 a.m., almost 2 hours after Pate was released, but she was nevertheless paid for a full day. One might infer that Urton was rehired to take Pate's place. But in the testimony of several witnesses, the inspectors who were working in the week after the layoff were named, and Urton was not named as one of them. Because of this and because of the evidence that none of the women's jobs involved special skill and that women could be transferred from one job to another, the inference is that Urton was not given work as an inspector and did not replace Pate. The Respondent did not offer any excuse for not using Pate on another job. Of the six women just named, only the names of Caddell and Urton appeared on the purloined union list. Although Urton had, on August 19, 1954, signed a pledge card for the Union, she was not, like Pate, on the union committee, and presumably, was not as active as Pate in the Union. Her personnel payroll record shows that she worked many short weeks.

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tained or re-employed were Erma Bate, who had delivered the purloined union list to Herrerias, Mary Castino and Clara Davello, both inspectors, Ruthie Deal, and Ernestine Haek.⁷⁹

I have previously stated that, in addition to those shown as rehired on the exhibit just referred to (General Counsel's exhibit 42c), the evidence shows that a number of employees whose names were not on that exhibit were employed, although their names were not on the retention list heretofore found to be a copy of the one read at the layoff meeting. Some in this category with their employment dates are: Marcia Freyling, July 22; Pastoria Hall, July 20; Renee Napier, October 1; Catherine Perry, August 2; Sylvia Peterson, July 19; Jessie Smith, Sep-

⁷⁹ Bate, Castino, Davello, and Haek had worked on the night shift. Each has been mentioned previously herein. There is no clear evidence that they, or any of them, were known by Herrerias to be union organizers or advocates before the layoff list was prepared. Evidence on Deal's employment record shows some conflicts. According to Gloria Pate (De-Font), Gloria Lindsay and Deal were with her while she was speaking with Martini. Documents prepared by the Respondent but offered in evidence by the General Counsel present confusing information. One exhibit (G. C. 42e) shows Deal as last having worked on October 15 and as being rehired on October 23. Another exhibit (GC 40) shows her as having last worked on October 18 and quit. One exhibit (GC 40g), which is a list of employees as of October 19, does not contain Deal's name. One exhibit (GC 19) indicates that Deal was stated by the Respondent to have been absent for 2 days with Respondent's permission. Deal's ballot at the union election was challenged by the Respondent but the challenge was later withdrawn.

tember 17; Willy Augustin, July 23; Joe Bertoni, September 28; Robert DeVilbiss, July 19; Lloyd Mills, October 11 (4 days before the layoff).

Although Foreman Williams claimed he did not find Pate's name on the retention list which he looked at (contrary to Pate's credited testimony of his admission to her), I cannot believe that the Respondent would have paid Pate for 2 hours' time for October 18, as it did, unless it had been responsible for her being at work on that date. It is not impossible to believe that Pate's name was inadvertently included on the retention list. But even if her name had been on there as a result of the Respondent's subjective mistake in intention, Pate was properly at work on October 18 and no evidence was adduced to justify a "correction" of the error by discharging Pate when, at the very same time, the Respondent was in the act of re-employing a number of laid-off employees. There is not a jot of evidence that Pate's work was unsatisfactory, and she had been at work from the first day of production that season. None of these re-employed had equal seniority with Pate. At the hearing, the Respondent's witnesses discounted seniority as a basis for retention. However, it should be noted that the Respondent represented to the employees at the layoff meeting that the layoffs were made on the basis of seniority, and it mailed a letter signed by Manager Martini to each laid-off employee with his final pay check containing the statement, "In fairness to all of our employees, we have kept on our payroll those of you that had the earliest employ-

ment date.” (GC 25) Weighing all the evidence, I infer and find that, in terminating Pate’s employment on October 18, the Respondent was motivated by a desire to rid itself of the more active and outspoken proponents of the Union, of which Pate was one. I conclude, therefore, that in terminating Pate’s employ on October 18, 1954, the Respondent discriminated in regard to her hire and tenure of employment in violation of Section 8 (a) (3) of the Act.

3. The discharge of Elsie Dickerson

Elsie Dickerson, who had worked for the Respondent in 1953, was again employed by the Respondent in 1954. Her starting date in 1954 was July 19. On the day shift throughout, she was first put on the job of trimming. During September she was transferred to the slicer for a day or two at a time and finally was kept there steadily. She signed a union pledge card on August 4, 1954, and attended union meetings but was not on the union committee. On October 14, when other union employees wore union buttons, Dickerson did, too. She was not, however, laid off on October 15, and on October 18, the next work day, she returned to her job on the slicer without being assigned to it by Herrerias.

On October 19, the day of the union election, just before quitting time (5 p.m.), Herrerias called out Dickerson’s name. Dickerson went to Herrerias, who told her that Manager Martini wanted her in his office. When Dickerson went to Martini he told her, “They want you over there,” pointing to the packing shed where the election was being held.

Dickerson apparently was wanted as an observer for the Union, because she acted as one although she had had no earlier notice that she would serve.

On October 23, Dickerson asked permission of Herrerias, who had become day-shift floorlady after the layoff, to change positions with an employee named Ruth Deal (previously mentioned in the discussion of Pate's discharge) and Herrerias granted it. Deal's job description was shown as "can car," but I infer that, when she was re-employed on October 23, she was given a job on the trim line. Deal was listed on an exhibit as on the union committee. On Monday, October 25, Dickerson again exchanged with Deal after lunch until about 3 p.m. This time she did not ask Herrerias for permission to make the change. Whether or not Deal did does not appear, but the Respondent makes no claim that Dickerson's failure to get permission to transfer was in any part a cause for her discharge. At about 2:30 p.m., Dickerson, while on the trim line on October 25, finding work somewhat slack because few apples were in the flume, picked up an apple that had been peeled and cored, used her coring knife to put two bisecting cylindrical holes horizontally through the apple, placed a core in one of the holes, protruding about an inch, and placed it back in the flume. Dickerson spoke of this as "decorating" an apple. This apple was removed further down the line either by an inspector named Virginia Chicano, who has already been mentioned in connection with the case of Orice Storey, or by Herrerias.

At 3 p.m., Dickerson went back on her regular job on the slicer. When she came down at quitting time, Floorlady Herrerias came to her, put her arm around Dickerson, and said, according to Dickerson, "I have something to do that I don't like to do, I have to let you go." When Dickerson asked why, Herrerias replied, "You were seen making holes in an apple and you put a core in it and put it in the water and it got to the office." Dickerson acknowledged making holes in the apple and told Herrerias that she had expected to be discharged. She testified that she had expected it because she had been picked as an observer in the election. Dickerson denied that she had fixed more than one apple as above described.

Herrerias' account of Dickerson's discharge in her testimony and in her affidavit differed. But in both she averred that she saw a number of such apples. Herrerias was not sure of dates and it is somewhat difficult to follow an orderly sequence of events in her testimony. By drawing inferences from her testimony, I judge that she was referring to the dates I have already identified as the two on which Dickerson and Deal changed jobs. With a substitution of dates for her indefinite references to time, her testimony was that on October 23 she saw apples (apparently like the one fixed by Dickerson) coming from the direction of the trim line to the position of the inspectors (whose job it was to catch any imperfect, or imperfectly trimmed, apples, or any foreign matter) and she asked "the inspector" (who, I infer, was Virginia Chicano,

although at that time there were three others) if many apples of that kind were coming down, and the inspector replied that quite a few were; so, according to Herrerias, "I just walked up and looked at *it*" (Italics supplied) and then began to investigate. She went behind the peeler line, she testified, because it was raised above the trimmers and she could look down at the trimmers, and from there she watched Dickerson and saw her "do that" to two apples. Herrerias did not speak to Dickerson, however. On Monday, October 25, Herrerias testified, she again saw apples in the same condition come down the line and asked Chicano to put aside all apples in that condition—Herrerias thought Chicano had two or three. She asked Chicano, she testified, how many there were and Chicano said that "they weren't as bad as the first." Then, she testified, "I took *the* apple (italics supplied) and showed Mr. Duckworth [the superintendent] and he told me to let her go, and I said, 'No, we will wait until the day is over.'" She let Dickerson finish the shift and then told her that she was discharged. Although Herrerias testified to apples "in that condition" in the plural, it is significant that she twice used the singular. Although she testified that on the first day she, herself, saw such apples in the flume, and although she asked Chicano if many apples were coming down "like that," and although she was told that there were quite a few, she testified that she went up and looked at "it." This also is inconsistent with Chicano's testimony, as will be shown later. If there were any other such apples,

I would have to conclude from Herrerias' testimony that the inspector must have removed them from sight or found them unobjectionable and let them go through. Again, although Herrerias gave the impression that on October 25 there was more than one apple with extra core holes, she testified that she took "the apple" to Duckworth. In her affidavit, made in February 1955,⁸⁰ Herrerias averred that she had seen Dickerson double-core two apples, putting a core back in one of the holes, on the first day and that she did not see her do it on the second day but assumed that she had done it because it only happened when Dickerson was on the trim line. In her testimony, she said that when she discharged Dickerson, she explained to her that she was discharging her because "you are making holes in the apples and throwing them down in the water." In her affidavit she averred that she had told Dickerson she was releasing her "because she'd cored *the* apple and put a core in *it*." (Italics supplied.)

Chicano, one of the four inspectors, testified on direct examination for the Respondent that she saw two or three dozen great big apples with cores sticking in the side come down toward her, that she put about five or six in a box which Herrerias came by and took away without saying anything that Chicano could hear. Chicano also contradicted Herrerias by testifying that she did not say anything to Herrerias. On cross examination, Chicano testified that the two or three dozen such apples were di-

⁸⁰ The affidavit is erroneously dated in 1954, which would be before the events herein related took place.

vided between the two days (October 23 and 25) and that she did not have room to put all such apples aside, so she removed the core and let the apples go through the slicer, except for five or six on the first day and three or four on the second day which she put in a box.

The four inspectors are arranged on the line in pairs side by side. The only other one to testify was Mary Castino who was called by the General Counsel and who testified that she saw one apple come through with holes through it and a core sticking out, that she saw someone, Herrerias, she was pretty sure, pick it up and walk around back of the trimming table. She testified that she had seen nothing else unusual about the apples coming through in the 2 or 3 days preceding this. If apples of the sort had come through in such large quantities as testified by Chicano, it is inconceivable that all of them would have gone to Chicano and that the other inspectors would not have seen them. Chicano was apparently strongly anti-union. Castino had been a union employee. Each, therefore, might have some bias in the matter. But Castino made a more favorable impression on me than Chicano from the standpoint of credibility and showed no evidence of bias as did Chicano. Chicano's exaggeration was obvious. I find that Castino's testimony is reliable, whereas Chicano's is not. In her affidavit, Herrerias avers that she spoke to Clara Davello, another of the inspectors, in addition to Chicano. But in her testimony she did not mention speaking to Davello, and Davello was not called as a witness.

Castino, the inspector called by the General Counsel, testified that around Hallowe'en time in 1954, a number of apples carved with pumpkin faces came down the line and that, if those apples were not too badly carved up, she would trim them up and send them through. Castino also described another apple which came down the flume in about November 1954. This one had a glove finger sticking out of the core hole. At that time Edna Hardin, the former floorlady of the day shift was working beside Castino. The latter testified that Hardin picked it up and handed it to Chicano but that nothing was said. The record is replete with instances of a variety of objects floated in the flume by employees to provide a laugh. Hardin testified to an instance when she removed something from the water that she believed Chairman Tony Bondi had put there. It was apparently placed there to cause some excitement. Bondi was present when the excitement occurred, but he testified that he did not put the object in the flume and that he sent someone into the cannery to remove it. As Hardin testified that she removed it, Bondi's emissary presumably was quite tardy.

Superintendent Duckworth testified that "Dickerson actually sabotaged our product" and that for that reason she was discharged. He testified that he made the decision to discharge her "after she had been warned not to plug those apples" and, when she did it again, he discharged her. Duckworth was not clear as to whether the events leading to Dickerson's discharge occurred on one or two days or

how many times Herrerias spoke with him, but then he testified that Herrerias first came to him in the morning and told him that someone "had been plugging these apples," showing him the apples (in his affidavit he said that Herrerias showed him "an apple"); that he told Herrerias to find out who was doing it, and that a couple of hours later Herrerias returned to him with more such apples (in his affidavit he said "another apple") and told him that she had seen Dickerson plugging the apples; that he told Herrerias to warn Dickerson not to do it—"a little horseplay is all right, but something like this could materially affect the quality of our product, so I asked her to tell Dickerson not to do it." It was either the same day or a subsequent day that Herrerias came to him again, he testified, showed him two more such apples and said it happened again (this third occasion was not mentioned at all in Duckworth's affidavit). Then, Duckworth testified, he told Herrerias to discharge Dickerson, but Herrerias said, "You better wait until the end of the day, it might look better, if you don't want to disrupt the crews." Duckworth said that he concurred in this. For the purpose of comparison with their testimony and the accounts given by each other in both testimony and affidavit form, and as an aid to understanding the credibility conflict, I set forth here the portions of Duckworth's and Herrerias' affidavits dealing with Dickerson's discharge.

Duckworth's affidavit, made on March 18, 1955, contains the following account of Dickerson's discharge:

The decision to discharge Elsie Dickerson was made by me on the afternoon the discharge took place. During that morning Floorlady Herrerias brought me an apple which had been plugged. By that I mean that after the apple core had been removed a hole had been cut in the side of the apple, and an apple core placed in this hole. I asked Floorlady Herrerias who had done it and she told me that Dickerson had. I asked Herrerias if she had seen Dickerson plug the apple and Herrerias replied that she had not but that the girl in the trimming line had seen Dickerson do it. Herrerias also told me that she had questioned Dickerson about the matter, and Dickerson had admitted that she had done it. In addition Herrerias told me that Dickerson had done this before, and recommended that Dickerson be discharged. I had not known that Dickerson had plugged an apple before. I told Herrerias to give Dickerson another chance. About an hour later that same morning Herrerias brought another apple which had been plugged and said Dickerson had done it again. I did not ask her if she had seen Dickerson do it on this occasion, but told her to discharge Dickerson at the end of the shift. Herrerias discharged Dickerson that afternoon at the end of the shift, when her time card shows it was punched out.

It will be observed that, in his affidavit, Duckworth avers that he told Herrerias to give Dickerson another chance but says nothing about having told Herrerias to warn Dickerson not to do it again, as

appears in his testimony. Herrerias admitted on the witness stand that she had not spoken to Dickerson at all about the incident before she discharged her.

Herrerias' affidavit, with respect to Dickerson, reads as follows:

After the layoff on October 15, 1954 I became day shift floor lady. Elsie Dickerson worked under me then. I discharged Mrs. Dickerson. I don't recall the date I discharged her, nor do I recall the day of the week. Mrs. Dickerson was very, very talkative and disturbed other employees. She was working on the seed celler, the slicer, when I first noticed this. Then Mrs. Dickerson asked me if she could go back behind the lines, that is, to go on the trim belt one afternoon, and I let her. That afternoon I noticed apples in the water, in the trough, that had been double cored and then had a core shoved in one of the two core holes. That first afternoon I noticed at least 5 or 6 such apples. When I noticed the apples that were fixed this way they were coming through the squirrel cage. I removed two such apples and showed them to the inspectors, the women who work on the second trim belt, and asked them if there were many such apples coming through. I asked Mrs. Chicano, I know. Mrs. Davello, Mrs. Mahoney and one other woman were also on that belt. I also asked Mrs. Davello, but I don't recall asking the others. They replied that they had taken out a few such apples. I took one of the two such apples and showed it to Mr. Duckworth, and

I said, "Mrs. Dickerson is doing this to the apples. I've been watching her." I don't recall what Mr. Duckworth replied; he may have said to keep watching her. Before going to Mr. Duckworth with the apple I went back up the line to try and find out who was cutting up the apples this way. I went to a position behind the peelers. The peelers are elevated above the first trim belt. Mrs. Dickerson was on the first trim belt. From that position I observed the employees who were on the trim belt. There were four women on the belt, as I recall. I watched Mrs. Dickerson; she was talking away with the other women on the belt, Isabelle Ameral, Mrs. Albini, and Gertrude Jones, she was next to Mrs. Ameral, as I recall, and I saw her pick up an apple, bore a hole in it with her knife, put a core in the apple, and then put it in the trough. I saw Mrs. Dickerson do it to two apples that first afternoon. I did not speak to Mrs. Dickerson about it. That first afternoon I did ask Mrs. Chicano and Mrs. Davello to be sure and catch any apples fixed the way I saw Mrs. Dickerson fixing them. Mr. Duckworth was the only person I told that Mrs. Dickerson was doing this, as I recall, although I may have mentioned it to Mr. Williams, the manager; I did not tell the inspectors who was doing it.

The next day, I don't recall whether it was in the morning or afternoon, without asking my permission, Mrs. Dickerson went back to the trim belt. I saw Mrs. Dickerson on the trim belt after lunch. I didn't say anything to Mrs. Dickerson. I did go to Mrs. Chicano, and probably Mrs. Davello too, and

asked them to watch and see if any more of those double cored apples came through. Then later, I went back to Mrs. Chicano and she showed me an apple she had put to one side. The apple was double cored and had a core in it. I asked Mrs. Chicano if there had been very many and she said not as many as the day before. I took the apple and showed it to Mr. Duckworth, and asked him what I should do. Mr. Duckworth said, "Let her go." He wanted me to let her go then and there, but I didn't want there to be any disturbance and so I said we'd better wait until the end of the day and he agreed. I can't recall whether it was morning or afternoon that I spoke with Mr. Duckworth about Mrs. Dickerson on this second day. I did not mark Mrs. Dickerson's time card until closing time that day; I marked it "released." I did not speak to Mrs. Dickerson before I spoke to Mr. Duckworth. So then at quitting time I told Mrs. Dickerson that I was sorry but I'd have to release her. She was on her way over to time out when I told her. She said, "Why?" and I said because she'd cored the apple and put a core in it. Mrs. Dickerson said, "I was only playing. I didn't mean any harm by it." She turned to a friend and said something like, "What do you know, I just got fired for playing with an apple or putting an extra core in the apple" and that she had done it before.

I had not seen Mrs. Dickerson double core an apple and put a core in it the second day, the day I discharged her. I assumed that she had done it because I had seen her do it the day before and

because it hadn't happened when she was not on the belt.

The several disparate accounts convince me that Duckworth and Herrerias attempted to bolster their stories by multiplying the number of "plugged" apples, the number of times on which Dickerson made such apples, and the number of times that Herrerias spoke with Duckworth about the matter, as well as by Duckworth's testimony about telling Herrerias to warn Dickerson. I am also convinced that Chicano adapted her testimony to the same end. I find, therefore, that Dickerson was never warned against making holes in apples or plugging them and that Herrerias discharged her for the only known instance of it as testified by Dickerson.

That Dickerson was playing when she should have been working and that an employer has a right to discharge an employee for playing on the job is not controverted by the General Counsel, I take it. But the question is, absent an animus against the Union, would the Respondent have discharged Dickerson for what she did? Herrerias admitted that she had seen "decorated" apples, that is, apples with faces carved in them and offered no criticism of employees who had carved them, but she testified that such apples had been perched up in front of the employees and had not been put back in the flume. (This, of course, is contrary to the testimony of Castino.) From this, I infer that the Respondent was not perturbed by the fact that an occasional apple, out of the tons of apples that went through the cannery, met an end which was inconsistent

with its normal destiny. If the Respondent was perturbed at all, I infer, it was because the carved apple was put back in the flume, with or without a core in it. Herrerias testified that she had never seen unusual objects in the flume. This, I find it difficult to believe in view of the testimony of the variety and number of objects that were either accidentally or intentionally set afloat in the flume, especially since Herrerias gave every evidence of being an observant person, as a competent floorlady would need to be, and because she was quick enough to see the apple carved by Dickerson on the one occasion. If, for the sake of argument, it be assumed that Herrerias had, in fact, not watched the flume close enough to notice such objects, even though such objects might endanger the quality of the product if they should succeed in passing through to the slicer or chopper, the question is raised as to whether or not the Respondent acted as it normally did. Would the Respondent have discharged any employee for carving an apple either with or without replacing the core, without prior warning, regardless of the union interest of such employee? Although such a discharge would appear unduly harsh in a case of an act that does not require an on-the-spot discharge, the Respondent may not be found to have discriminated against the discharged employee if it was accustomed to making discharges on slight provocation and without prior warning. In determining what course the Respondent would follow, I have considered, among other things, the following: Duckworth appeared to feel that a little

horseplay was all right, but that sabotaging the product was not. In view of this testimony and of the extensive amount of horseplay or practical joking and of decorating or making doll apples, that went on, I deduce that playing, alone, in small doses was unobjectionable. The loss of an apple also appears to have been regarded as of small consequence since the makers of decorated apples or doll apples were apparently not reprimanded. Hence, if Dickerson's conduct was of serious consequences it was solely because she made an additional core hole in an apple and put a core back in that hole. Now, if this were actually believed by the Respondent to be a danger to its product, then why, without warning Dickerson against it (as was admitted by Herrerias to be the case), did the Respondent not discharge Dickerson on the spot instead of running the risk that Dickerson would do the same thing again before the day was over? Duckworth's explanation was that Dickerson would not have been likely to do it again because she was being closely watched. This explanation lacks conviction, however, since Herrerias did not let Dickerson know that she was watching her. Furthermore, the floorlady could not be expected to spend all her time in the one spot watching Dickerson and neglecting her customary supervisory duties. I infer that if any danger existed, the Respondent considered it extremely slight. Even if, as Herrerias would have it believed, Dickerson was not discharged on the first day on which she was observed making a "plugged" apple, Herrerias was taking a chance on a repeti-

tion which she herself did not expect to observe, for Herrerias was obliged to rely on the inspectors to catch other such apples just as they had caught the one Dickerson is known to have made. This scarcely looks like a case of imminent danger or "sabotage." There is evidence that occasionally the machine which was supposed to core the apples would fail to remove the core of an apple. If the core in such case were not removed by one of the peelers or trimmers, it would certainly have been caught by the inspectors. Although, at the hearing, the Respondent's witnesses sought to portray Dickerson's act as a grave danger on the assumption that the core in her apple might have passed the inspectors, Martini, in an affidavit made before the hearing, stated that it was "inconceivable" that plugged apples could have gotten past the inspectors. And if the core had got past the inspectors and gone through the slicer, there was a shaker screen that would have removed seeds and small particles. Also there were women to remove specks when apple sauce was being made. On one occasion in September 1954, the shaker screen was found not to be coarse enough to remove many small chips. There were employees there to remove them but they were finding difficulty in removing all of them. Martini preferred to continue running, anyway, for a couple of weeks until a new screen was obtained. Such indifferent concern to the fact that parts of the apple were getting into the product when they should not is inconsistent with labeling Dickerson's act as a sabotage of product.

In view of such evidence, I am convinced that Dickerson's playful act would, in itself, not have prompted the Respondent to discharge her, especially without warning, since this was apparently the first instance of a discharge for such cause. On the other hand, the Respondent was antipathetic to the Union and was shown to have a disposition to discharge prominent union employees for slight cause, as is evident from Hardin's testimony concerning an admission of such conduct by Herrerias in the case of three employees whom she discharged in September 1954 and from the discharges of Storey and Pate as herein related, not to mention the discriminatory elimination of a disproportionate number of union employees in the October 15 lay-off. I am persuaded by all the evidence, and therefore find, that the Respondent made use of slight cause to discharge Dickerson (for which it would not normally have discharged an employee) because she was a prominent union supporter, as was known to the Respondent from the fact that she had been called by Herrerias and Martini to serve, and did serve, as a union observer at the time of the union election less than a week before the discharge.⁸¹ By discharging Dickerson, the Respondent discriminated in regard to her hire and tenure of employment in violation of Section 8 (a) (3) of the Act.

⁸¹ See *N. L. R. B. v. Homedale Tractor & Equipment Company*, 211 F. 2d 309 (C. A. 9); *N. L. R. B. v. Dant & Russell, Ltd.*, 207 F. 2d 165 (C. A. 9).

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

As I have found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Since I have found that the Respondent discriminated in regard to the hire and tenure of employment of certain of its employees, by its acceleration of the time for termination of the night shift for unlawful purposes, the remedy should embrace all those who were affected by the early termination of the night shift, whether such employees were pro-union or not and whether the persons affected were only employees not on the retention list or whether they also were those who worked on the night shift and could not work on the day shift even if the Respondent had them on its retention list and had offered to give them work on the day shift.

In determining what employees should be included in the remedy, I shall have to pass on an issue raised by the Respondent's contention that

certain persons quit on October 15 before the layoff became effective.

The Respondent contended that a number of employees had clocked in on the night shift on October 15, attended the layoff meeting in the warehouse, and then left without finishing the shift, and that, by leaving then, they had quit and were not laid off. Evidence as to these employees, whether or not they were all present on October 15, and their reasons for failure to return to work on the night shift if they were, is not altogether clear. The evidence suggests in some instances that employees who were either laid off or who, although on the list to be retained, could not switch from the night to the day schedule for family reasons, failed to work after the layoff meeting because they considered it not worth their while in view of the fact that they would be through for the season in a short while anyway. Although it is not a matter of evidence, it is a reasonable inference that some employees who knew they were being laid off may have left in order to get ahead of an anticipated rush for jobs at other canneries. Some apparently felt aggrieved at not being retained for work after October 15 and left in disgust. Some may have left because they misunderstood that, even though they were not retained, they were expected to finish out the night shift that night.

A basis for such a misunderstanding as that which was last mentioned is apparent from the evidence. Duckworth testified that all night-shift employees were notified to work that night after the

meeting, but the manner in which they were notified does not appear to have been adequate to assure notice to all and to avoid misunderstanding. Duckworth testified that he told some employees himself and told Floorlady Herrerias and Foreman Williams to notify "the people who were to work on the night shift to be sure to return that night." Williams testified that he told the night-shift employees that "we would run a night shift as soon as the meeting was over in the warehouse." But Williams could not say for sure that he had notified each and every employee who came to work on the night shift, and, from the testimony, I infer that the notification was a rather haphazard one, so there is a reasonable chance that some failed to receive notice. To assure complete notification, an announcement should have been made at the warehouse meeting. This not only was not done, so far as the evidence shows, but what was said at that meeting could have left night-shift employees in some doubt or confusion. Just before reading a list of the employees to be retained, McGuire made a statement that those who were not retained could turn in their caps and aprons and get a refund. He apparently did not add that they should not turn them in before the completion of the night shift. Those not listed for retention, therefore, may reasonably have understood that a night shift would operate that night, but that only those whose names were read by McGuire for retention were to work on it.

In its exceptions to the Regional Director's re-

port on challenged ballots, the Respondent listed the names of 20 employees who, allegedly "severed their employment with the Employer by not reporting for work on the night shift on October 15." The argument made by the Respondent in such exceptions appears to limit its objection to those of the employees who punched in for work on the night shift on October 15 but who left without completing the shift. At the hearing, however, the Respondent deleted the name of Ensebia Carrera, one of the 20 named in such exceptions but added 10 more names, thereby increasing its list to 29 names of employees who allegedly quit. But the additions were not confined to employees who had punched in on the night shift on October 15. Included were some who had not come to work at all. The Respondent produced time cards for October 15 for some of the 29 employees. These cards showed that some of the 29 had punched in before the warehouse meeting and had either punched out at the end of it at 4:30 p.m. or had not punched out at all.⁸² One of the employees whose name was added at the hearing was Anna Hance, a day-shift employee. On Friday, October 15, 1954, she punched in at 6:35 a.m. and

⁸² Virginia Brott, Elizabeth Cooley, Kathleen Hontar, Norma Morien, Bernice Nunes, Richard Breuer, Evelyn Schrum, among others.

Albert Rahm, whose time card was produced, punched in at 4:56 p.m. (long after the warehouse meeting was over and others had punched out) and had punched out at 5:31 p.m. There is no evidence as to why he punched out at that time. So far as appears, he may have been told by a supervisor to leave.

punched out at 10:57 a.m. A penciled notation at the top of her card said "Quit" but the handwriting was unidentified, so there was no evidence as to when it was put on there or by whom. I give it no credit as a record.⁸³ So far as appears from the credited evidence, Hance may have gone home ill or been temporarily laid off. She was shown as again working on October 30, 1954. However, testimony was given concerning several of the others. The names of employees Pauline Ploxa, Dora Rawles and Josephine Geist, among others, were added at the hearing to the Respondent's list of employees who allegedly had quit. All were shown by the General Counsel's exhibit 36 as listed for retention, except that Geist was spelled Gust. Ploxa and Rawles went to Manager Martini after the warehouse meeting, told him their names were on the list to be retained but said they could not work days. They asked Martini if they had to work that night. He told them that they did not have to but, as they were there, they might as well. They went home without finishing the shift.

One of the employees listed by the Respondent

⁸³ The evidence indicates that the Respondent frequently indulged in presumptions that employees had quit where the employee was absent for an excusable reason and that in such cases, when the employee returned, the Respondent would put him on again and the supervisor would make out a time card for him if none had been prepared in advance by the office. The Respondent takes the position that it did not refuse to take back employees who had been out because of illness. In several instances the word "quit" was written on a time card or payroll record when the employee actually was out sick.

as having quit was Susie Coats. Her time card showed that she had not worked after October 12. She testified that she had been home sick and was still out sick on October 15, and that when another employee told her she was dropped she did not return although she had expected to return to work the next day.

I note that some other employees, not listed as having quit, also did not work on October 15, but were not included on Respondent's list of quits. For all that appears, Julia Ann Row had not worked between October 6 and 28 but she was not shown as having quit and the records contained no explanation of her absence. The case of Erma Bate has been previously related. She had left in a huff after the warehouse meeting because her name was not on the list, but she was back at work on October 18 with the Respondent's approval. Stella Vesels did not work from after noon on October 13 until sometime in the following week, during which she worked 40 hours. Edyth Wasin had not worked after October 11 until Monday, October 18. Edna McCarl did not work at all in the week ending October 16. Ruth Albertoni was shown by the Respondent's records as not having worked after September 27 and a handwritten notation "Quit" appeared on her card, but a challenge of her ballot by the Respondent was withdrawn when she was later shown to have been sick. It is needless to list all such cases. I am satisfied that Coats did not quit and that insufficient evidence of an intention to quit was shown in other instances where the employee did not work on October 15.

Assuming, for the sake of argument, that more than the few whose time cards are in evidence as above stated came to work on the night shift on October 15 but left without finishing the shift, should they as a matter of either fact or law be said to have quit? Duckworth gave testimony which, if believed, might prove one employee's intent to quit. He testified that he asked an employee named Richard Breuer where he was going, as Breuer was leaving, and that Breuer replied, "If I'm not going to work any more this year I may as well just quit right now." In his prehearing affidavit, Duckworth stated:

After it [the warehouse meeting] was over I went into the cannery and I saw a number of the employees walking out. I asked Mrs. Herrerias what they were doing, and she said they did not want to finish work. I did not talk to any of the employees myself.

The evidence indicates that the warehouse meeting lasted until about 4:30 p.m. Breuer's time card was punched out at 4:17 p.m. If he left at that time, it is unlikely that Duckworth even saw him. I find that Duckworth's testimony about Breuer is not reliable enough on which to base a finding. The Respondent, itself, adduced evidence that employers try to avoid giving advance notice to employees that they will be laid off at a certain future time because it is the nature of employees not to remain until that time arrives. I see no reason to differentiate Breuer's case from that of any of the others who

punched in and then left on October 15 before the night shift ended. I find that they had no intention to quit independently of the layoff.⁸⁴

Since I have found that the Respondent terminated the night shift on October 15, in advance of the customary time, for discriminatory reasons by means of diverting its supply of apples to the Co-op, all those who lost work with the Respondent after October 15 because there was no night shift on which to work and because they either were told they were not to be on the day shift thereafter or, because they could not work days were the objects of the Respondent's discriminatory act. Ploxa and Rawles were, in effect, given permission not to work the last shift. If the others who were present on the night of October 15 and did not finish the night shift because they were being laid off anyway did not actually have their employment terminated by Respondent at the time they left, they were constructively terminated by the Respondent's announcement of discriminatory layoffs.⁸⁵

Absent the unlawful variance from its normal, nondiscriminatory practice of laying off the night crew first, those who worked on the night shift in 1954 would have been continued until such date as, in the usual course of events, the Respondent would have terminated the night shift in 1954. It may be argued that this is impossible now to determine.

⁸⁴ Hunt Heater Corporation, 108 NLRB 1353.

⁸⁵ Jos. N. Fournier, Rome Lincoln-Mercury Corp., 86 NLRB 397; Hunt Heater Corporation, 108 NLRB 1353; Marlo Offset Printing Corp., 113 NLRB No. 93.

But although it is not determinable with scientific exactitude, a reasonable approximation can be computed by determining the length of time the night shift would have been employed to can some 1300 tons of apples, the amount unnecessarily transferred to the Co-op. Taking into account that the day shift was continued until December 11, 1954, to can approximately 1940 tons of apples (the amount in inventory on October 15 plus the amount delivered by growers to the Respondent after that date by my calculations) I figure that the night shift, working on the same days and at the same rate of production as the day shift would have had enough apples (had the Respondent not transferred them to the Co-op for discriminatory purposes) to keep it employed until approximately November 27, 1954. I shall therefore recommend that the Respondent make whole those of the night shift who were actually or constructively laid off on October 15, 1954, or who were unable to continue on days thereafter, for any loss occasioned by the discrimination against them, by paying to each of them an amount equivalent to that which, but for the discrimination, he normally would have earned in the Respondent's employ from October 15 until November 27, 1954, or until the date of their re-employment by the Respondent if that was sooner, and that the Respondent make whole those of the day shift who were laid off on October 15, for any loss suffered as a result of the discrimination against them by paying to each of them an amount equivalent to that which he would normally have earned from

October 15 until December 11, 1954, the end of the canning season, or until the date of their re-employment by the Respondent if that was sooner, less, in each case, whether day or night-shift employee, his net earnings elsewhere during the period indicated.⁸⁶ A list of all such employees entitled to back pay will be found in Appendix B, hereto attached and made a part hereof. I exclude from such list those who were shown to be on the list for retention and who did not work thereafter unless evidence was adduced to show that they would have worked on the night shift but could not have worked on the day shift. Thus Josephine Geist is not included, because it does not appear that she could not work on the day shift.

I shall further recommend that the Respondent make whole Orice Storey, Glora Pate, and Elsie Dickerson for any loss suffered as a result of the discrimination against them by paying to each of them a sum of money equivalent to that which each would have earned in the Respondent's employ between the date of her discharge and December 11, 1954,⁸⁷ less her net earnings⁸⁸ during such period.

⁸⁶ *Crossett Lumber Company*, 8 NLRB 440, 447-498; *Republic Steel Corporation v. N.L.R.B.*, 311 U. S. 7. If applicable in any instance involved herein, the net earnings shall be computed on a quarterly basis in accordance with the Board's established practices described in *F. W. Woolworth Company*, 90 NLRB 289, 291-4.

⁸⁷ The dates of discharge are: Storey, September 25, 1954; Pate, October 18, 1954; Dickerson, October 25, 1954.

⁸⁸ See Footnote No. 86.

To implement the effectuation of this recommendation I shall recommend that the Respondent preserve and make available to the Board, upon request, its personnel payroll records, time cards, and other records containing information on rates of pay, earnings, and other pertinent data.

As the unfair labor practices committed by the Respondent indicate a disposition to interfere with the basic rights of employees guaranteed in the Act and as I find that a danger exists that the Respondent in the future may continue, although not necessarily by the same means, to defeat self-organization of its employees, I shall recommend that it cease and desist not only from the acts herein found to violate the Act but from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Orice Storey, Gloria Pate (DeFont), Elsie Dickerson, and all employees listed in Appendix B hereto attached, thereby discouraging membership in the aforesaid labor organization, the Respondent has engaged in and is engag-

ing in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Respondent, Sebastopol Apple Growers Union, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO, or any other labor organization of its employees by discriminating in regard to their hire or tenure of employment or any term or condition of employment; and

(b) Requiring applicants for employment to answer any question concerning their union membership; and

(c) By threats of reprisal, unlawful interrogation, or in any other manner interfering with, restraining, or coercing its employees in the exercise

of their right to self-organization, to form, join or assist the aforesaid labor organization or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which, I find, will effectuate the policies of the Act:

(a) Make whole Orice Storey, Gloria Pate De-Font, Elsie Dickerson, and each of the employees whose names are listed in Appendix B hereto attached for any loss they may have suffered as a result of the Respondent's discrimination against them, in the manner set forth in the section above, entitled "The remedy";

(b) Preserve and make available to the Board or its agents, upon request, for examination or copying, all personnel payroll records, time cards, social security payment records, employees' income tax report records, and all other records and reports necessary to analyze the amount of back pay due under the terms of this Recommended Order;

(c) Post at its plant at Sebastopol, California, copies of the notice attached hereto and marked Appendix C, to which shall be attached copies of

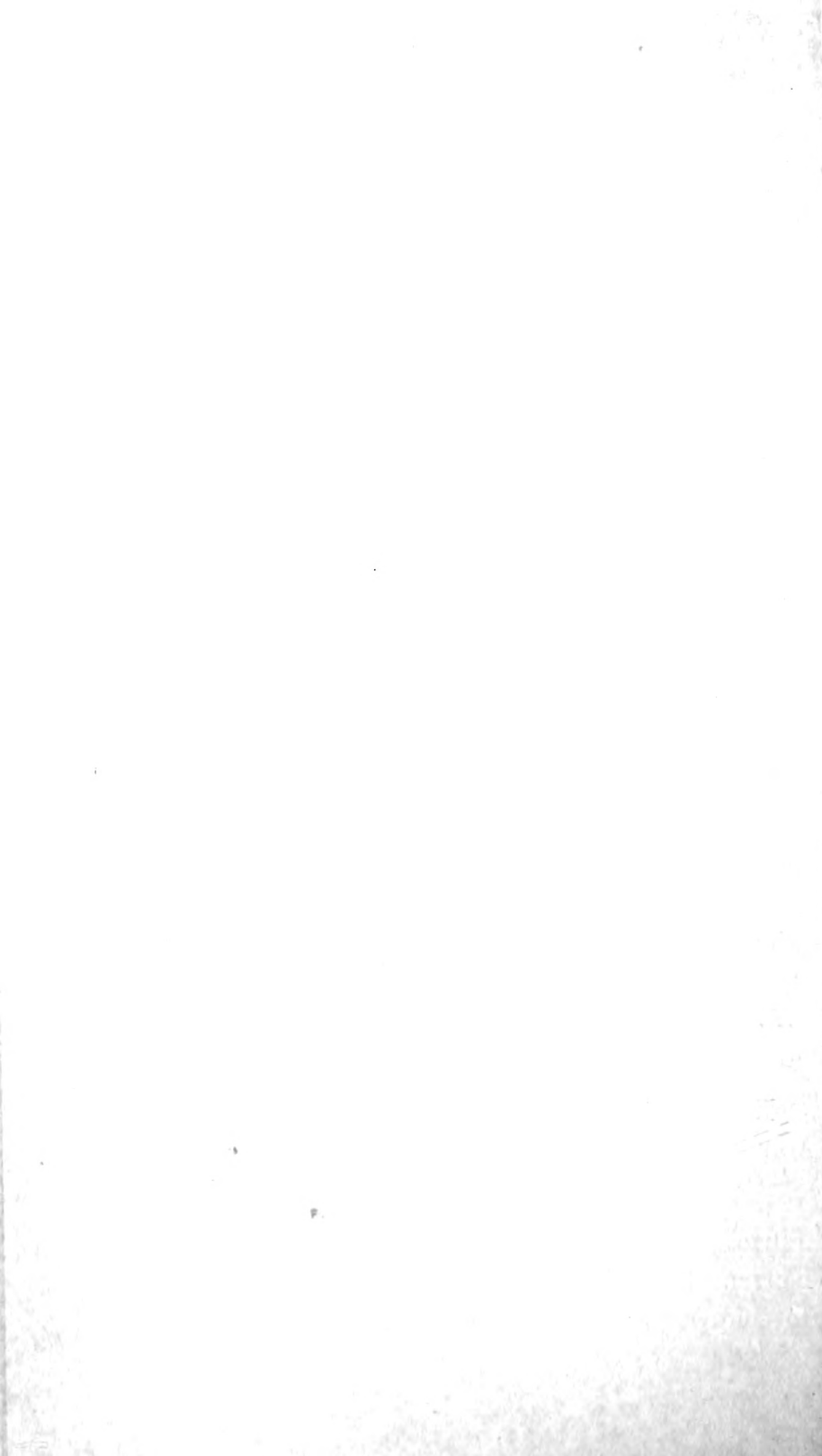
the list attached hereto and marked Appendix B. Copies of such notice and list to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices and lists are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twentieth Region, in writing, within 20 days from the date of the receipt of this Intermediate Report of what steps the Respondent has taken to comply herewith.

It is further recommended that, unless within 20 days from the date of the receipt of this Intermediate Report the Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take the action aforesaid.

Dated this 7th day of March, 1956.

/s/ JAMES R. HEMINGWAY,
Trial Examiner.



APPENDIX A
WOMEN

Name	Date Hired in 1954	Shift	Signed Union Card		Name on Purloined Union List	On Union Committee	Name read on Retention List	Worked on or after 10/19
			D	N				
ALBERTONI, Ruth	8/9				X			S
ALBINI, Dora	7/15	X	X	X	X		X	X
ALLEN, Lois	8/13		X				X	X
ALLEN, Marceline	9/28	X	X	X				
ALLAN, Mildred	9/2	X					X	Sick on 10/12(last date wrkd)
AMERAL, Isabele	7/16	X	X	X			X	X
AMERAL, Lina	7/9	X	X	X	X			
AMES, Nora	8/2	X	X	X	X			
ANDERSON, Caroline	9/13	X	X	X				
ANGLE, Marvel	10/5	X	X					
ANTONE, Bertha	10/7		X					
ANTONE, Eva	9/13	X	X	X				
ARMERUST, Joyce	7/20		X				X	X
AUGUSTIN, Elisabeth	7/16		X	X			X	X
AWENDER, Karolina	7/15	X	X	X				
AZEVEDO, Virginia	10/12	X						
BAKER, Bonnie	9/23		X					
BARTLETT, Marie	7/15		X				X	X
BATE, Erma	7/19		X	X	X	X		X
BERTOLI, Gereline	8/24		X				X	X
BERTOZZI, Eleanor	7/20		X				X	
BILLS, Julia	7/21	X	X	X			X	X
BLAIR, Ethel	7/22		X	X	X			
BONAR, Julia	7/20		X				X	X
BRENNAN, Ruth	7/20		X				X	X
BRICKNER, Bessie	7/20		X	X	X	X		
BRIDGES, Leona	8/5	X	X	X	X			
BRIDGES, Oma	7/28	X	X				X	Rehired 10/20
BRINES, Zelma	7/17	X	X	X				
BROCK, Ines	7/20		X				X	X
BROTT, Virginia	10/8		X					
BROWN, Gladys	7/19	X	X	X			X	X
BROWNING, Billie	7/20		X					
BROWNING, Doris	7/20		X					
BUHRMAN, Nina	8/2	X	X	X	X			S
BUTLER, Dolores	7/20		X				X	X
BYRD, Marjorie	7/16	X	X	X	X			
CADDELL, Mary	9/13		X	X	X		X	X
CAMERON, Harriet	7/31	X	X	X			X	X
CARRERA, Ensebia	9/13		X				X	Could not work days
CASSIDY, Beulah	7/20		X				X	X
CASTINO, Mary	7/28	X	X	X	X	X	X	X
CHAMES, Joanne	7/26	X	X	X			X	Could not work for lack of ride
CHAPMAN, Alta	8/25	X	X	X			X	
CHAPSON, Louise	7/20		X	X	X		X	X
CHICANO, Virginia	7/15		X				X	X
CIBOS, Mary	9/8	X	X	X				
CLARK, Ruth	7/17	X	X	X			X	
COATE, Natalie	9/10	X	X					



Name	Date Hired in 1954	Shift		Signed Union Card	Name on Purloined Union List	On Union Committee	Name read on Retention List	Worked on or after 10/19	
		D	N						
COATS, Susie	9/28		x	x	x				Sick 10/12-10/15 incl.
COFFEY, Marie	7/20	x	x						
COLLINS, Marie	9/28	x						x	Rehired 10/20
CONNERS, Frances	7/20	x					x	x	
COOLEY, Elizabeth	10/11		x						
CRUMP, Gatha	10/11	x	x	x					
CUTTRESS, Evelyn	7/20	x	x	x			x	x	Worked until 10/23
CUTTRESS, Valeria	7/20	x	x	x			x	x	
DAHL, Evelyn	9/29	x	x	x					
DAVELLO, Clara	8/27		x	x	x	x	x	x	Sick on 10/15
DAVIS, June	9/10		x						
DEAL, Ruth	8/9	x	x	x	x	x	x	x	Abs. 10/18-10/23 w/permis.
DEWITT, Bettie	9/27		x				x	x	
DICKERSON, Elsie	7/19	x	x	x			x	x	Discharged 10/25
DOTY, Esther	7/6	x					x	x	
DRAKE, Frances	7/26		x				x	x	
EDWARDS, Helene	7/22		x						
ELERS, Myrtis	9/7	x	x	x	x				
ELLIS, Mary	9/6	x	x	x	x				
ELMORE, Hazel	9/29	x					x	x	
ELMORE, Jean	6/7	x					x	x	
ELVY, Cora	7/20		x				x	x	
FENTON, Violet	8/30	x	x	x					
FISHELSON, Ida	7/20		x				x	x	
FLETCHER, Esther	7/20		x	x	x	x			
FLOYD, Elsie	9/18	x	x	x					
FRANK, Charlotte	7/22		x				x	x	
FREYLING, Delores	7/20		x				x	x	
FREYLING, Marcia	7/22		x					x	Next wrkd 10/22-Quit 11/23 f/school
GATHER, Lula	7/20		x	x	x	x			
GALE, Maude	7/20		x				x	x	
GARRISON, Fannie	7/15	x	x	x					
GEIST, Josephine	10/8		x	x			x		
GESECK, Dorothy	8/31		x				x	x	
GULLEDGE, Daisy	7/15		x				x	x	Sick on 10/15
HACK, Ernestine	7/19		x	x	x	x	x	x	
HALL, Pastoria	7/20	x	x	x			x		Rehired 10/18
HANCE, Anna	7/22	x	x	x			x		Rehired 10/30
HANSEN, Hazel	9/18	x	x						
HANSON, Ruth	8/18		x	x	x				
HARRIS, Mary	8/19		x				x	x	
HARRISON, Lucille	9/29	x	x						
HAYDEN, Rose	9/7	x	x	x					
HERRALL, Gail	10/12	x	x						
HOFFSCHNEIDER, Elsie	9/7		x	x					
HOFLAND, Theresa	9/13		x				x		Rehired 10/18
HONTAR, Ellen	8/5		x	x	x				
HONTAR, Kathleen	8/5		x	x	x				
HOPE, Laura	10/6	x	x						



Name	Date Hired in 1954	Shift	Signed Union Card		Name on Purlined Union List	On Union Committee	Name read on Retention List	Worked on or after 10/19	
			D	N					
BOWES, Georgia	8/7		x				x	x	
HYDRA, Marie	8/4		x		x	x			
JACOBUS, Vita	10/12		x				x	x	
JOHNSON, Irene	8/25		x	x	x				
JOHNSON, Leonor	7/23		x	x	x	x			
JOHNSON, Melba	10/9		x				x	x	
JONES, Cornelia	10/4						x	x	
JONES, Gertrude	7/17		x	x	x		x	x	
KING, Dolores	9/11		x						
KOUNOVSKY, Evelyn	7/15		x				x	x	
KRUSE, Viola	8/7		x	x	x	x			
LAYMAN, Lila	8/6		x	x	x	x			
LEE, Eva	7/20		x	x	x	x			
LINDLEY, Beulah	8/10		x	x	x	x			
LINDEAY, Gloria	7/21		x	x	x	x			Sick on 10/15
LOEFFLER, Sandra	7/28		x				x		Last worked 10/2
McAFEE, Bernice	7/15		x	?	x		x	x	
McCARL, Edna	9/6		x	x	x		x		Did not work wk ending 10/16
McCARTHY, Lora	8/29		x						
McCULLOUGH, Alice	9/28		x				x		Sick 10/19-Next wrkd 10/20
McDERMOTT, Vita	8/13		x				x	x	
McGUIRE, Mary	7/19		x				x	x	
McHUGH, Elizabeth	8/28		x	x	x				
McPHEE, Eloyce	7/16		x	x	x				
MAHONEY, Goldie	7/22		x				x	x	
MARQUEZ, Mary	9/11		x	x		x			
MAM, Goldie	8/28		x	x					
MAY, Mary	8/5		x	x	x				
MAZZUCCHI, Nancy	5/14		x						
MILLER, Hazel	7/20		x	x	x				
MIZELL, Barbara	8/31		x				x	x	Did not work 10/14-10/20
MONROE, Betty	10/6		x				x		
MORIEN, Norma	10/7							x	Rehired 10/25
MYNOCK, Ada	8/21		x	x	x				
NAPIER, Renee	10/1		x					x	
NELSON, Irene	8/18		x			x			
NEMET, Elisabeth	7/16		x	x	x		x		
NIEMI, Selma	8/31		x	x	x		x	x	
NOBLE, Mary	7/20		x				x	x	
NUNES, Bernice	7/31		x	x	x	x			
OFFUTT, Dorothy	7/16		x	x	x	x			
PATE, Georgia	7/15		x	x	x	x	x		Terminated 10/18
PATTERSON, Marian	8/4		x						
PERRY, Catherine	8/2		x					x	
PESENTI, Claudina	7/20		x				x	x	
PETERSON, Sylvia	7/19		x				x		Quit 11/13 - school
PIROLLE, Esther	7/21		x	x	x				
*FLOXA, Pauline	9/13		x	x			x		Could not work days
PCNCIA, Anita	7/20		x				x	x	



Name	Date Hired in 1964	Shift	Signed Union Card	Name on Purloined Union List	On Union Committee	Name read on Retention List	Worked on or after 10/19	
		D M						
POOL, Lorraine	9/22	x	x	x				
*RAWLES, Dora	9/13	x	x	x		x		Could not work days
*REARDON, Darlene	10/12	x	x					
*REECE, Gertrude	9/25	x	x	x		x	x	
RETELA, Gertrude	7/22	x	x				x	
REYNOLDS, Rosette	7/24	x				x		Quit on 10/18
ROCCA, Pauline	9/28	x	x	x				
ROSS, Aloa Rae	10/2	x	x					
ROW, Julia Ann	7/22	x	x				x	Sick 2 weeks-rehired 10/28
RUFINO, Margaret	7/20	x	x	x				
RUNYON, Lillian	9/3	x						
RUSSELL, Mary	7/24	x	x	x	x			
SCHAEFLER, Marie	7/16	x	x	x			x	Out-Indus. Accident-rehired 11/8
SCHOENTHAL, Elisabeth	7/17	x	x	x		x	x	
SCHRAM, Evelyn	8/23	x						
SCOTT, Gertrude	8/24	x	x	x				
SCOTT, Merle	7/22	x						
SEIDEL, Mary	9/13	x						
SHIELDS, Viteria	7/16	x	x	x				
SMITH, Jessie	9/17	x					x	Did not work bet. 10/15 & 10/2
SMOKER, Helen	7/20	x				x	x	
SOUZA, Mathilda	9/27	x						
SUSOFF, Ruth	7/19	x				x	x	
SWENINGSON, Amy	10/5	x	x					
TABER, Marion	9/1	x						
*TATUM, Nancy	10/12	x	x					
THORNTON, Lois	10/5	x	x	x				
THORP, Ilah	7/20	x				x	x	
TRIPP, Marie	8/10	x	x					
URTON, Etta	7/20	x	x	x			x	Rehired 10/18
VEACH, Shirley	7/21	x				x	x	
VERNON, Amy	9/23	x	x	x				
VESSELS, Stella	9/17	x					x	Rehired 10/19
VOGEL, Anna	7/15	x	x	x				
WAKELAND, Geneva	7/20	x				x	x	
WASIN, Edyth	8/9	x	x				x	Rehired 10/18
WILDER, Louise	9/14	x	x	x				
WILSON, Edith	7/27	x					x	
ZIEGENBEIN, Thelma	7/21	x				x	x	
ZIMMER, Patricia	10/6	x				x		Could not work days

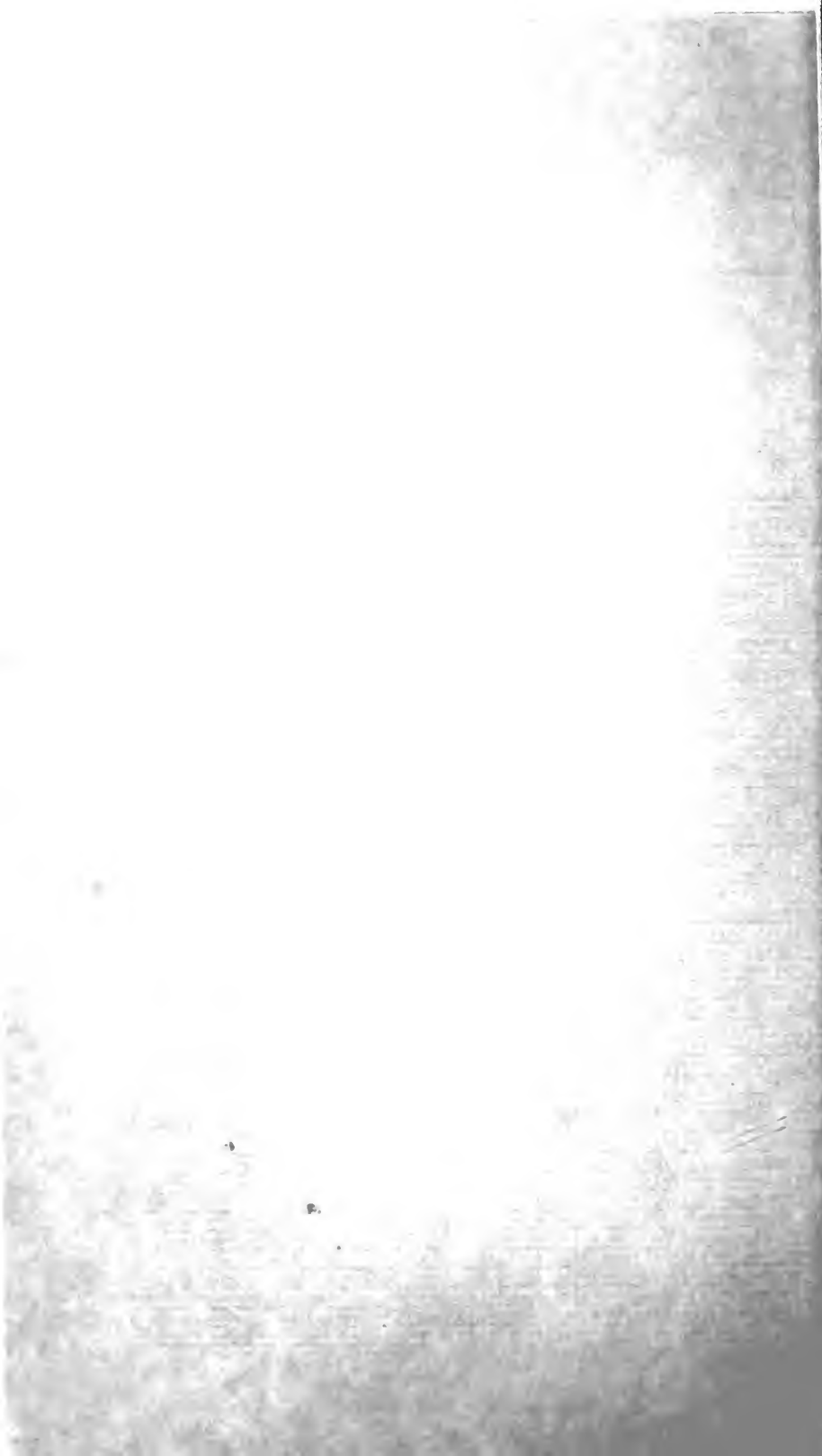
S-sick on and after 10/19

* Union card signed at place of employment before hire by Respondent.



MEN

Name	Date Hired in 1954	Shift	Signed Union Card	Name on Purloined Union List	Name read on Retention List	Worked on or after 10/19
LMAN, Lymon	9/1	D N	x			
PERSON, William (P)	9/9		x		x	x
JUSTIN, Willy	7/23		x	x		x
TE, John	9/14		x			
NETT, Laurie	7/14		x		x	x
RTONI, Joe	9/28		x			x
EUER, Richard	9/28		x			
RGER, George	9/21		x			
APMAN, Orland (P)	7/1/53		x		x	x
ICANO, Salvador	7/19		x		x	x
FEY, John	7/19		x	x		
POCK, Irvin	6/21		x		x	x
RELA, Frank	7/1/53		x		x	x
KNOWER, Lee	8/30		x		x	x
RDEN, David	7/29		x			
VIS, George	9/27		x			
VILBISS, Robert	7/19		x			x
WNER, George	7/20		x		x	x
MCAN, Worthy	9/24		x			
MORE, Eugene	7/17		x		x	x
LORNI, Adolfo	8/16		x		x	x
STA, Enrico	8/16		x		x	x
STER, Herman	7/20		x		x	x
STER, William	9/23		x			
IBOURGHOUSE, Ernest	7/13		x	x		
RCIA, Jose	3/29		x	x	x	x
LEDGE, Alvin Martin	7/20		x		x	x
LEDGE, Lonzo	5/1/53		x		x	x
LL, Sidney	8/31		x		x	x
ELIN, Arthur	10/4		x	x		x
GGENS, Edward	9/2/53		x		x	x
MCINEZ, John	2/28		x		x	x
MENSON, Raymond (P)	7/21		x		x	x
MENSON, Willie	9/13		x		x	x
MNGERS, Oscar	7/20		x		x	x
MLEHER, Gerald	8/27		x			Quit 10/18
ME, Leonard	7/23		x	x	x	
ME, Robert	6/28		x		x	x
EMIS, Victor (P)	9/4/53		x		x	x
DEFFLER, Carl	7/15		x		x	Quit 10/18
SCALL, Harry	9/29		x			
AREA, Alvin	7/21		x			
ASOUKA, Frank	7/8		x		x	x
MILLS, Lloyd (P)	10/11		x			x
MARRON, Henry	7/8		x			x
MANDASON, Andy (P)	5/24		x		x	x
MANELLI, Ray (P)	7/13/53		x	x	x	x
MAPER, Oliver	4/19		x		x	x



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Name	Date Hired in 1954	Shift		Signed Union Card	Name on Purloined Union List	On Union Committee	Name read on Retention List	Worked on or after 10/19
		D	N					
PHILLIPS, Richard	9/24	x		x				
POGGI, Joseph Jr. (P)	4/19			x			x	x
POZZI, Charles	9/27			x				
RAHM, Albert	6/21			x	x	x		
REYNOLLS, Richard	8/11			x	x	x		
RODRIGUES, Edward	7/14			x			x	x
ROGERS, Gerald	9/29			x				
SMITH, Joyce	7/17			x				
SMITH, Wayne	8/7			x	x		x	x
SNODGRASS, Robert (P)	5/10			x			x	x
STOREY, Clarence	7/15			x	x	x		
SWENINGSON, Rudolph	10/5			x	x			
TALLMAN, Lester (P)	1952			x			x	x
TODD, Gerald	8/21			x			x	x
TSURUMOTO, George (P)	7/15/53			x			x	x
UNCIANO, Froilan	8/24			x				
WEARE, William	7/20			x				
WOOD, Robert	7/20			x			x	x
YEAGER, Kenneth	9/2			x			x	x

(P) Hired as more or less permanent employees for year around work.



APPENDIX B

DAY SHIFT

Women

Allen, Marceline. Ameral, Lina. Ames Nora.
Anderson, Caroline. Angle, Marvel. Antone, Eva.
Awender, Karolina. Azevedo, Virginia.

Bridges, Leona. Bridges, Oma. Brines, Zelma.
Buhrman, Nina. Byrd, Marjorie. Cihos, Mary.
Clarke, Ruth. Coate, Natalie. Coffey, Marie. Col-
lins, Marie. Crump, Gatha.

Dahl, Evelyn. Eilers, Myrtis. Ellis, Mary. Fen-
ton, Violet. Floyd, Elsie. Freyling, Marcia. Gar-
rison, Fannie. Hall, Pastoria. Hance, Anna. Han-
son, Hazel. Herrall, Gail. Harrison, Lucille.
Hayden, Rose. Hope, Laura. Hydera, Marie.

Johnson, Lenor. Kruse, Viola. Layman, Lila.
Lee, Eva. Lindley, Beulah. Lindsay, Gloria. Mc-
Carl, Edna. McCarthy, Dora. McCullough, Alice.
McHugh, Elizabeth. McPhee, Eloyce. Marguez,
Mary. Maw, Goldie. May, Mary. Miller, Hazel.
Mynock, Ada.

Nelson, Irene. Offutt, Dorothy. Pool, Lorraine.
Reardon, Darlene. Rocca, Pauline. Ross, Aloa.
Russell, Mary. Scheffler, Marie. Scott, Gertrude.
Shields, Viteria. Smith, Jessie. Sweningson, Amy.

Tatum, Nancy. Thornton, Lois. Tripp, Marie.
Urton, Etta. Vernon, Amy. Vessels, Stella. Vogel,
Anna. Wasin, Edyth. Wilder, Louise.

Men

Berger, George. Coffey, John. Davis, George.

DeVilbiss, Robert. Duncan, Worthy. Fribourghouse, Ernest. Heflin, Arthur.

Lee, Leonard. Mills, Lloyd. Phillips, Richard. Storey, Clarence. Sweningson, Rudolph. Unciano, Froilan. Weare, William.

NIGHT SHIFT

Women

Albertoni, Ruth. Antone, Bertha. Baker, Bonnie. Bate, Erma. Blair, Ethel. Brickner, Bessie. Brott, Virginia. Browning, Billie. Browning, Doris. Carrera, Ensebia. Coats, Susie. Cooley, Elizabeth.

Davis, June. Edwards, Helene. Fletcher, Esther. Gaither, Lula. Hanson, Ruth. Hoffschneider, Elsie. Hoffland, Theresa. Hontar, Ellen. Hontar, Kathleen.

Johnson, Irene. King, Dolores. Mazzucchi, Nancy. Morien, Norma. Napier, Renee. Nunes, Bernice. Patterson, Marian. Perry, Catherine. Peterson, Sylvia. Pirolle, Esther. Ploxa, Pauline.

Rawles, Dora. Row, Julia. Rufino, Margaret. Runyon, Lillian. Schrum, Evelyn. Scott, Merle. Seidel, Mary. Souza, Mathilda. Taber, Marion. Wilson, Edith.

The following, all on the retention list, are excluded from this Appendix for reasons shown:

1. Betty Monroe—Although added to complaint on motion by General Counsel, no evidence was aduced that she could not work days.

2. Josephine Geist—No evidence that she could not work days although she is named in amendment to complaint.

3. Patricia Zimpher—Not named in complaint, although there is evidence that she could not work days.

Men

Allman, Lyman. Augustin, Willie. Bate, John. Bertoni, Joe. Breuer, Richard. Darden, David. Foster, William. Kelleher, Gerald.

McCall, Harry. Marra, Alvin. Narron, Henry. Pozzi, Charles. Rahm, Albert. Reynolds, Richard. Rogers, Gerald. Smith, Joyce.

The following men named in the complaint are excluded from this appendix for the reasons shown: Fay Neel was not employed by the Respondent between July 31 and October 15, 1954; so, instead of being laid off, he was just rehired at the time of the layoff. Alvin Gulledge was identified as the same person as Martin Gulledge, whose name was on the retention list and who continued to work on the day shift. His name was stricken from the complaint on motion by the General Counsel.

APPENDIX C

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO, or any other labor organization of our employees by discharging, laying off,

refusing to re-employ, or in any other manner discriminating in regard to the hire, tenure of employment, or any other term or condition thereof, of any of our employees or any applicant for employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by a valid agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will make whole the following employees for any loss suffered as a result of the discrimination against them:

1. Orice Storey.
2. Gloria Pate DeFont.
3. Elsie Dickerson.
4. All employees named in Appendix B of the Intermediate Report of the Trial Examiner, a copy of which is attached hereto and made a part hereof.

All our employees are free to become or remain members of the above-named labor organization, or any other labor organization, or to refrain from

such membership except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership or nonmembership in or activity on behalf of any such labor organization.

Dated
Sebastopol Apple Growers Union.

By
(Representative) (Title).

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Causes.]

**MOTION BY CHARGING PARTY TO REOPEN
THE RECORD AND FOR WITHDRAWAL
OF CHARGE, OR IN THE ALTERNATIVE
TO DISMISS THE COMPLAINT**

Now comes the Charging Party above named, General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, by its attorneys, Tobriner, Lazarus, Brundage & Neyhart, and moves the Board to reopen the record herein for the purpose of permitting the Charging Party to withdraw the Charge, or in the alternative to permit the Charging Party

to move to dismiss the Complaint, or in the further alternative the Charging Party moves the Board to permit it to withdraw the charge without reopening the record for the following reasons:

1. The Complaint alleges inter alia that the Respondent, on October 15, 1954, discriminatorily laid off a number of employees whose names are set forth in the appendix to the Complaint, and at various dates discriminatorily discharged three individuals named in the Complaint, and also engaged in acts of interference with the employees' rights under the Act.

2. That the Complaint alleges that the purpose of the alleged discriminatory layoff was to interfere with and affect the results of a representation election held on October 19, 1954, about four days after the layoff.

3. That recently and since the hearing was closed in this matter, the Charging Party and the Respondent have reached an agreement under and whereby Respondent has recognized the Charging Party as the collective bargaining agent for the employees of Respondent, and therefore it will not be necessary to count the challenged ballots of the employees involved in the layoff or to have a certification from the Board.

4. That the Charging Party and Respondent have also agreed that the individuals named as alleged discriminatees in "Appendix A" of the Complaint and the three individuals alleged as having

been discriminatorily discharged shall be placed upon a preferential hiring list except for a certain number of individuals whose principal employment during the 1954 processing season was at canneries other than Respondent and one individual alleged to have been laid off who completed the 1954 season and worked part of the 1955 season until she quit; that such individuals on such preferential hiring list are to be given notice when Respondent first begins accepting applications for the processing season in 1956 of the fact that employment is available to them and of their right to apply for such employment within one week of such notification.

5. That the Charging Party and Respondent have also agreed that the Charging Party will obtain waivers from all of the alleged discriminatees with respect to any claims for possible back pay; that there is a serious question as to whether any of the alleged discriminatees are, in fact, entitled to back pay and if so the amounts to which they may be individually entitled are so small as not to warrant further expenditure of time and money for the purpose of determining the amounts, if any, to which they might be entitled.

6. That the foregoing agreement and arrangement between the Charging Party and the Respondent will and does effectuate the policies of the Act which has as its underlying purpose the stabilization of labor relations and that such arrangements, agreements, procedures and methods of resolving the dispute and the alleged unfair labor practices

are compatible with any possible remedy which the Board might possibly order.

7. That no good purpose would be served and the national policy, as set forth by Congress in the Act, will not be fulfilled if this proceeding continues with the attendant consumption of time through further protracted litigation and the possible filing of exceptions.

Wherefore, the Charging Party respectfully requests that:

(1) The record herein be reopened for the purpose of permitting it to make the aforesaid motions to withdraw the charge or, in the alternative, to dismiss the Complaint; or

(2) in the further alternative that the Board grant the Charging Party's motion herein to withdraw the charge.

Dated: March 9, 1956 at San Francisco, Calif.

Respectfully submitted,

GENERAL TRUCK DRIVERS, WAREHOUSE-
MEN AND HELPERS UNION, LOCAL NO.
980, I.B.T.C.W. & H. OF AMERICA, AFL,

By TOBRINER, LAZARUS, BRUND-
AGE & NEYHART,

/s/ By STANLEY NEYHART,
Its Attorneys.

Respondent, by its counsel, Severson, Davis &

Larson and Nathan R. Berke, hereby joins and concurs in the foregoing Motion.

Respectfully submitted,

SEBASTOPOL APPLE GROWERS
UNION,

SEVERSON, DAVIS & LARSON,

/s/ By NATHAN R. BERKE,

Its Attorneys.

[Title of Board and Causes.]

ERRATUM

On page 23, line 10 of Intermediate Report in the above-entitled case, after night shift and before which was, insert the following, which was omitted from the stencil:

as early as possible, Manager Martini gave instructions for the supervisors to make a selection of employees for retention on the single shift.

Dated this 19th day of March, 1956.

/s/ JAMES R. HEMINGWAY,

Trial Examiner.

[Title of Board and Causes.]

ORDER

An Intermediate Report having issued in this proceeding on March 7, 1956, in which the Trial

Examiner found certain unfair labor practices and recommended a remedy, the Charging Party having filed a motion to reopen the record to permit withdrawal of the charge or to dismiss the complaint because of an agreement between the Charging Party and the Respondent, the General Counsel having filed opposition to the motion, and the Board having reconsidered the matter,

It Is Hereby Ordered that the motion be, and it hereby is, denied because it does not appear that it will effectuate the policies of the Act to close the case on the basis outlined in the motion.

Dated, Washington, D. C., April 11, 1956.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

[Title of Board and Causes.]

ANSWER OF CHARGING PARTY TO OPPOSITION OF COUNSEL FOR GENERAL COUNSEL TO MOTION TO REOPEN THE RECORD AND FOR WITHDRAWAL OF CHARGE, OR, IN THE ALTERNATIVE, TO DISMISS THE COMPLAINT

Opposition of the General Counsel to the above-described motion of the charging party having heretofore been filed and served upon charging party, charging party hereby answers said opposition in the following respects:

1. Counsel for General Counsel alleges the agreement between the charging party and the respondent for preferential hiring does not fulfill the requirements of the Act, "that to remedy the unfair labor practices so found, the employees so discriminated against be made whole and all employees be assured of the rights guaranteed them in the Act by the posting of appropriate notices."

The agreement does fulfill the requirements of the Act in that the alleged discriminatees are to be placed upon a preferential hiring list and rehired by the charged employer. The basic objective of the charging party in this dispute was to obtain reinstatement of the alleged discriminatees in order to enable them to continue to work in their jobs. This objective, coupled with the demand for recognition based upon the majority representation of the union, was indeed the reason and purpose of a long, bitter and difficult strike. To contend that the requirements of the Act are not fulfilled because employees are not "made whole," and to fasten upon possible back pay as the prime issue in this instance is to distort the purpose of the Act and the sought objectives of the charging party undertaken to effectuate the Act.

The charging party, through the expenditure of great efforts and sums, has made possible the accomplishment of these objectives. It has brought about the preferential hiring of those very employees for whom it filed charges. It has brought about the recognition of the union as the bargaining

agency. It has brought about the recognition of the rights guaranteed to the employees by the Act. The charging party accomplished these objectives only over a period of time extending from October, 1954 to April, 1956. At this late date, it is unfortunate that the process of the Board, so long continued without result, should be invoked in a manner to prevent the conclusion of this dispute. It is particularly ill-advised that this interposition of the Board occur at a time when the canning season of 1956 will soon commence so that the rights of the employees will again be undetermined during another season. Nor is there any certainty that such a situation will not continue for a long period of time, thereby negating the accomplishments of the charging party in bringing about a solution of this problem.

We respectfully submit that the purpose of the Act can be defeated by insistence upon secondary and ancillary procedures which do not touch the basic problem: the employment of these cannery workers.

To the extent that the General Counsel complains of the fact that the settlement does not provide the employees be assured of the rights guaranteed them in the Act by the posting of appropriate notices, the charging party submits that the employees are now well informed that the rights guaranteed them in the Act have been recognized. The settlement agreement has had the most wide-spread publicity not only in the Sebastopol area, but throughout the state of California. Each of the involved employees

has been informed and assured that his employment rights are now protected. The employer has recognized that it must not engage in the future in unfair labor practices.

Furthermore, the charging party is informed and believes, and upon such information and belief alleges, that the employer would have no objection to the posting of appropriate notices to the extent that it recognizes the union, that it will grant preferential rehiring to the employees involved, that it will not engage in the future in unfair labor practices and will otherwise abide by, and conform to, the settlement agreement. Under such circumstances, it is straining at a minor provision of the Act to attempt to upset an all-important settlement agreement because formal appropriate notices have not been posted.

2. The General Counsel alleges that the "facts indicate that the amount of back pay to which these employees would be entitled constitutes a substantial sum of money." The allegation of counsel is conjecture only. In the first instance, many of the involved employees have waived their rights to any back pay since obviously such employees were far more interested in immediate employment than speculative back pay which could be obtained only after years of litigation. In the second instance, the number of employees who would be in a position to collect back pay is conjectural, since the charging party's records show that over one-half of such individuals have left the area and cannot be located.

In the third instance, it is unknown to what extent such employees may have obtained other employment, which would reduce the interim earnings. In the fourth instance, the only objection which has been made of any kind or nature emanates from a small group of less than eight employees, who for their own political purposes within the union and people, seek to embarrass it.

3. Counsel alleges that the mere fact that respondent has granted recognition and a contract to the charging party is not justification for depriving employees of back pay and the assurance through posting of appropriate notices that unfair labor practices would not be repeated.

As to the deprivation of back pay, we submit that the deprivation of jobs as above set forth is far more important. As to the assurance of rights through the posting of notices, we submit as above set forth, that appropriate notices may be posted by the employer as above alleged, and that in any event, such posting is formal and procedural only.

We submit that the charging party has been vitally and primarily concerned in this issue and would not undertake any settlement that it was not positive would effectuate the purposes of the Act. Collective bargaining has been established; industrial strife has been ended. Peaceful procedures for preventing interference by the employer with the legitimate rights of the employees have been set up. These are the basic purposes of the Act. This collective bargaining contract is the first in the history

of this area. It was consummated only after tremendous effort and sacrifice.

The charging party appreciates that the Board has attempted to effectuate the policies of the Act, but it must point out that the necessarily slow procedures involved did not effectuate these basic purposes until such time as the charging party itself brought about their fulfillment. The charging party submits in all sincerity that it does not now lie with the General Counsel to attempt to impair the industrial peace which the charging party has finally achieved.

Dated at San Francisco, California, this 13th day of April, 1956.

TOBRINER, LAZARUS,
BRUNDAGE & NEYHART,
/s/ By MATHEW O. TOBRINER,
Attorneys for Charging Party.

[Title of Board and Causes.]

**MOTION TO RECONSIDER, MODIFY OR SET
ASIDE ORDER OF BOARD**

The Board having heretofore issued its Order that the Motion to Reopen the Record for the Withdrawal of Charge, or, in the Alternative, to Dismiss the Complaint in the above-entitled matter be denied, such order being dated April 11, 1956, and opposition of General Counsel to the above described Motion having been filed, the Answer of the

Charging Party to said opposition having been filed, Charging Party hereby requests that the matter be reconsidered; that the Order be modified or set aside for the following reasons:

1. Charging Party filed an Answer to the opposition of Counsel, but it is evident that the Answer and the Order of the Board crossed in the mail.

2. The allegations of the Answer of the Charging Party to the opposition of the General Counsel should be considered by the Board and weighed by it in order that the matter be properly resolved.

3. For the additional reasons stated in the Answer we request that the Motion to Reopen the Record and for the Withdrawal of the Charge, or in the Alternative, to Dismiss the Complaint, be granted.

Dated at San Francisco, California, this 20th day of April, 1956.

Respectfully submitted.

TOBRINER, LAZARUS,
BRUNDAGE & NEYHART,
/s/ By MATHEW O. TOBRINER,
Attorneys for Charging Party.

United States of America
Before the National Labor Relations Board

Case No. 20-CA-1035

SEBASTOPOL APPLE GROWERS UNION and
GENERAL TRUCK DRIVERS, WARE-
HOUSEMEN AND HELPERS UNION,
LOCAL No. 980, AFL-CIO.

Case No. 20-RC-2637

SEBASTOPOL APPLE GROWERS UNION,
Employer, and GENERAL TRUCK DRIV-
ERS, WAREHOUSEMEN AND HELPERS
UNION, LOCAL No. 980, AFL-CIO, Peti-
tioner.

DECISION AND ORDER

On March 7, 1956, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Intermediate Report also embodied the Trial Examiner's findings with respect to the representation case. Thereafter, the Respondent filed exceptions and a supporting brief.

The Board¹ has reviewed the rulings of the Trial

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the supporting brief, and the entire record in this case, and adopts the Trial Examiner's findings,² conclusions, and recommendations.

1. The Respondent alleges bias and prejudice on the part of the Trial Examiner. We have carefully scrutinized the entire record and find no support for these allegations.

2. On June 7, 1957, the Respondent and the Union jointly requested permission for withdrawal of the pending representation case on the ground that for the past 2 years, a collective bargaining agreement has been in effect between them and that no further issues exist with respect to that case. We shall grant the request.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations

² We note the following inadvertencies in the Intermediate Report, which, however, do not affect the Trial Examiner's conclusions or our agreement with them. The Intermediate Report states at one point that many union advocates were known to the Respondent before October 14, 1955; the date should be October 14, 1954. At footnote 42, the Trial Examiner states the Respondent's inventory as of June 30, 1952; this date should be June 30, 1954. Further, in the same footnote there is reference to a difference of 39,970 cases; the figure should be 39,770.

Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sebastopol Apple Growers Union, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discouraging membership in General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO, or any other labor organization of its employees by discriminating in regard to their hire or tenure of employment or any term or condition of employment; and

(b) Requiring applicants for employment to answer any question concerning their union membership; and

(c) By threats of reprisal, unlawful interrogation, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist the aforesaid labor organization or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Orice Storey, Gloria Pate De Font, Elsie Dickerson, and each of the employees whose names are listed in Appendix B attached to the Intermediate Report for any loss they may have suffered as a result of the Respondent's discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(b) Preserve and make available to the Board or its agents, upon request, for examination or copying, all personnel payroll records, time cards, social security payment records, employees' income tax report records, and all other records and reports necessary to analyze the amount of back pay due under the terms of this Order;

(c) Post at its plant at Sebastopol, California, copies of the notice³ attached to the Intermediate Report and marked Appendix C, to which shall be attached copies of the list attached to the Intermediate Report and marked Appendix B. Copies of such notice and list to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an authorized representative

³ This notice, however, shall be and it hereby is amended by striking from the first paragraph thereof the words "Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals Enforcing an Order."

of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices and lists are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order of what steps the Respondent has taken to comply herewith.

It Is Further Ordered that the joint request of the Petitioner and Employer to withdraw the petition in Case No. 20-RC-2637 be, and it hereby is, granted.

Dated, Washington, D. C., August 27, 1957.

BOYD LEEDOM, Chairman,
ABE MURDOCK, Member,
STEPHEN S. BEAN, Member,

[Seal]

NATIONAL LABOR RELATIONS
BOARD.

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SEBASTOPOL APPLE GROWERS UNION,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before the Board and known upon its records as Case Nos. 20-CA-1035 and 20-RC-2637, respectively.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner James R. Hemingway on July 19, 20, 21, 22, 25, 26, 27, 28, August 3, 14, 15, 29, September 8, 9, 12, 13, 14, 15, 16, 21, 22, 23, October 12, 13, 14, 15 and 17, 1955, together with all exhibits introduced in evidence and rejected exhibits.

2. General Counsel's letter dated November 18,

1955 moving to reopen the record for the purpose of introducing in evidence certain letters.

3. Respondent's letter dated November 21, 1955, opposing General Counsel's motion to reopen the record.

4. Copy of Trial Examiner's ruling denying General Counsel's motion to reopen the record, dated November 28, 1955.

5. Copy of Trial Examiner's notice of intention to correct transcript of testimony, dated December 6, 1955.

6. Copy of Trial Examiner's ruling on Respondent's objection to proposed corrections and order correcting transcript of testimony, dated February 29, 1956.

7. Copy of Trial Examiner's Intermediate Report and Recommended Order, dated March 7, 1956, (annexed to item 17 hereof).

8. Joint Motion of General Truck Drivers, Warehousemen & Helpers Union, Local 980, AFL-CIO (hereinafter called Charging Party) and Respondent to reopen the record and for withdrawal of charge, or, in the alternative, to dismiss the complaint, dated March 9, 1956.

9. Copy of Trial Examiner Hemingway's erratum dated March 19, 1956.

10. Copy of General Counsel's opposition to joint motion of Charging Party and Respondent to reopen the record and for withdrawal of charge,

or, in the alternative, to dismiss the complaint, dated March 22, 1956.

11. Copy of Board's order denying Charging Party's motion to reopen the record to permit withdrawal of charge, or, in the alternative, to dismiss the complaint, dated April 11, 1956.

12. Charging Party's answer to General Counsel's opposition to Charging Party's motion to reopen the record and for withdrawal of charge, or, in the alternative, to dismiss the complaint, dated April 13, 1956.

13. Charging Party's motion to reconsider, modify or set aside order of Board, dated April 20, 1956.

14. Respondent's letter, dated April 23, 1956, joining in the Charging Party's motion to reconsider, modify or set aside order of Board.

15. Copy of Board's order denying Charging Party's motion to reopen the record to permit withdrawal of the charge, or to dismiss the complaint, dated May 3, 1956.

16. Copy of Respondent's exceptions to Intermediate Report and Recommended Order received May 28, 1956.

17. Copy of Decision and Order issued by the National Labor Relations Board on August 27, 1957, with Intermediate Report and Recommended Order annexed.

In Testimony Whereof, the Executive Secretary

of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 25th day of July, 1958.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 16117. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Sebastopol Apple Growers Union, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: August 4, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16117

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SEBASTOPOL APPLE GROWERS UNION,
Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), respectfully petitions this Court for the enforcement of its Order against Respondent, Sebastopol Apple Growers Union, its officers, agents, successors, and assigns. The consolidated proceeding resulting in said Order is known upon the records of the Board as "Sebastopol Apple Growers Union and General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO," Case No. 20-CA-1035; and "Sebastopol Apple Growers Union Employer and General Truck Drivers, Warehousemen and Helpers Union, Local No. 980, AFL-CIO Petitioner," Case No. 20-RC-2637.

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on August 27, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the pro-

ceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those portions of the Board's said order which relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 25th day of July, 1958.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed July 28, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In this proceeding petitioner National Labor Relations Board will rely upon the following points:

1. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act.
2. Substantial evidence on the record considered as a whole supports the Board's conclusion that

respondent discriminatorily discharged certain of its employees in violation of Section 8 (a) (3) and (1) of the Act.

Dated at Washington, D. C., this 25th day of July, 1958.

MARCEL MALLET-PREVOST,
Assistant General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed July 28, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR
ENFORCEMENT

Comes now respondent, Sebastopol Apple Growers Union, and for its answer to the petition for enforcement herein admits, denies and avers as follows:

I.

Respondent admits it is a California corporation engaged in business in the State of California, which is within this judicial circuit but denies that it committed any unfair labor practices.

II.

Answering paragraph (2), respondent admits that proceedings were had before the petitioner in the matter referred to in the petition and that on August 27, 1957, petitioner issued and served an Order

upon respondent. Respondent denies that petitioner acted upon due proceedings and denies that petitioner duly stated its findings of fact and conclusions of law; respondent avers that the findings of petitioner are not supported by substantial evidence on the record considered as a whole and are contrary to the evidence; that the conclusions that respondent violated Section 8(a)(1) and (3) of the Act are not supported by lawful findings or any findings and are contrary to Sections 7, 8, 9 and 10 of the Act; that the procedure used by petitioner was unfair and denied respondent due process of law in that evidence that should have been excluded was admitted, in that relevant and material evidence that was offered was denied admission, in that petitioner admitted into and considered as evidence a written statement that was improperly obtained in violation of law, and in that the joint motion of respondent and charging party to reopen the record and for withdrawal of the charge, or, in the alternative, to dismiss the complaint was denied by petitioner contrary to law, arbitrarily, and without a fair hearing or any hearing; respondent further avers that the Order of petitioner referred to in said paragraph (2) is not supported by any lawful findings of fact or conclusions of law, and that said Order requires affirmative action that violates the Act and that will not and does not effectuate the purposes of the Act.

III.

Answering paragraph (3), respondent avers that

it has no information or belief on the subject sufficient to enable it to answer the allegations contained therein, and placing its denial on said ground, denies each and every such allegation.

Wherefore, respondent prays that this Honorable Court enter a decree denying the petition and refusing to enforce the Order of petitioner and that such Order be set aside in its entirety, or alternatively, that the Order be modified in the respects the same may be found to be improper, and for such other and further relief as to this Honorable Court may seem meet in the premises.

Dated: September 18, 1958.

NATHAN R. BERKE,
SEVERSON, DAVIS
& LARSON,

/s/ By NATHAN R. BERKE,
Attorneys for Respondent.

Certificate of Service Attached.

[Endorsed]: Filed September 19, 1958. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-1035

In the Matter of: Sebastopol Apple Growers Union
and General Truck Drivers, Warehousemen
and Helpers Union, Local No. 980, AFL.

Case No. 20-RC-2637

In the Matter of: Sebastopol Apple Growers Union,
Employer, and General Truck Drivers, Ware-
housemen and Helpers Union, Local No. 980,
I.B.T.C.W. & H. of America, AFL, Petitioner.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 3, Sonoma County Court House,
Santa Rosa, California, Tuesday, July 19, 1955.

Pursuant to notice, the above-entitled matter
came on for hearing at 10 o'clock, a.m.

Before: James R. Hemingway, Esq., Trial Ex-
aminer.

Appearances: David Karasick and Robert Magor,
Esqs., 630 Sansome Street, San Francisco, Califor-
nia, appearing on behalf of the General Counsel,
National Labor Relations Board. Messrs. Severson,
McCallum & Davis, by Nathan R. Berke, Esq., 38
Sansome Street, San Francisco 4, California, ap-
pearing on behalf of Sebastopol Apple Growers
Union, the Respondent. W. M. Caldwell, 405 Mont-
gomery Street, San Francisco, California, appear-

ing on behalf of Sebastopol Apple Growers Union,
the Respondent. [2]*

* * * * *

Mr. Karasick: I call Mr. Roy Rhodes.

ROY A. RHODES

a witness called by and on behalf of the General
Counsel, being first duly sworn, was examined and
testified as follows: [45]

Direct Examination

* * * * *

Q. (By Mr. Karasick): Mr. Rhodes, by whom
are you employed?

A. By the General Truck Drivers' Local 980.

Q. And what is your position with that union?

A. Secretary-Treasurer and Business Manager.

Q. How long have you held that position?

A. Since 19—January the 13th, 1948, I believe.

* * * * *

Q. Do you know Mr. Elmo Martini?

A. Yes, I do.

Q. Did you ever have a conversation with Mr.
Martini last year with respect to the employees of
the plant over which he is Manager, Sebastopol
Apple Growers Union? A. Yes, I did.

Q. And when did that conversation take place?

A. Well, as near as I can recollect, on or about
the 28th of July, I believe.

Trial Examiner: 1954?

The Witness: Right.

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

(Testimony of Roy A. Rhodes.)

Mr. Karasick: May I leave this 1954 calendar for the availability of the witness should he wish it? Any objection, Counsel?

Mr. Berke: No.

Mr. Karasick: Thank you.

Q. (By Mr. Karasick): Where did you see Mr. Martini?

A. At his office at the Sagu Plant.

Trial Examiner: How do you spell that?

The Witness: Well, it's the Molino Plant but they call it the Sagu Plant.

Mr. Karasick: May I say that is an abbreviation of Sebastopol Apple Growers Union, the beginning initials of each of those names.

Q. (By Mr. Karasick): Is Sagu what they generally refer to [47] the Respondent as around this area? A. That's right, yes.

Q. Now, will you tell us who was present with you, if anyone, when you saw Mr. Martini?

A. Mr. Bertolucci.

Q. And what is his first name?

A. Angelo A. Bertolucci. I don't know what his middle name is.

* * * * *

Q. (By Mr. Karasick): Did Mr. Bertolucci at that time have any connection with the Union?

A. Yes, he was the President of the Local.

Q. And had been for some time past?

A. That's right.

Q. Anyone else present besides you, Mr. Bertolucci, and Mr. Martini during this conversation?

(Testimony of Roy A. Rhodes.)

A. No one from the Union, no.

Q. Well, was there anyone else present?

A. Just an office girl, a receptionist as you go in the office. [48]

Q. This is in the office? A. That's right.

Q. Tell us what occurred and what was said and by whom on that occasion.

A. Well, we went in and asked for Mr. Martini——

Trial Examiner: Who is "we"?

The Witness: Mr. Bertolucci and myself.

Trial Examiner: All right.

A. (Continuing) ——and the office girl said he's busy in the back. She called him and he came on out to the front office. Am I going too fast?

Trial Examiner: No, go ahead.

The Witness: You want——

Q. (By Mr. Karasick): What was the conversation now?

A. Well, I'd rather not use the exact words that he said when he met us at the door.

Trial Examiner: Well, if you remember them, why, you may use them.

The Witness: Well, the language wasn't any too good.

Mr. Berke: Well, I will move that be stricken.

Mr. Karasick: I consent to that. All I am interested in is what the sum and substance of the conversation was.

Q. (By Mr. Karasick): Mr. Martini addressed

(Testimony of Roy A. Rhodes.)

some remarks to you and then you had some business to transact?

Mr. Berke: Wait a minute, wait a minute. I will object to that examination, until we have who said what. [49]

Mr. Karasick: All right. Never mind. I will withdraw the question.

Q. (By Mr. Karasick): To your best recollection, Mr. Rhodes, tell us, as Mr. Berke expressed it, who said what, as well as you recall; irrespective of what the words were, whether they were good or bad words, tell us, and who said it.

A. You want just exactly the words?

Q. Right, as you remember them.

A. Oh, he asked what the hell we were doing over there, and I told him that we came over to talk to him, that we had quite a few of the people signed up and they wanted to be organized, and he said you come back in about two years, we don't want to be bothered at the present time. And then we left the office and went up to the corner store to get a drink.

Q. Now, who is "we"? All three of you?

A. That's right, Mr. Martini and myself and Mr. Bertolucci.

Q. Was there further conversation then?

A. There was.

Q. What was the conversation then, and who said what?

Mr. Berke: Where did this take place? I didn't get that.

(Testimony of Roy A. Rhodes.)

The Witness: At the corner store, about—oh, I imagine about a block from the office. We went in his station wagon and we sat in the car a few minutes and we asked if we could have permission to talk to the people, and it would be much easier to negotiate a contract; and we wanted to notify them [50] that we wanted to talk to people, we had pledge cards to pass out; and he said no, that he'd rather we not talk to the people.

Mr. Berke: I didn't get that. He said no what?

The Witness: He said no, he'd rather not we talk to the people at all till later, and we didn't—I can't remember all the conversation we had at that time, because it was some time back, but as near as I can recall he said, well, there's a board meeting tonight and I will take it up with the board meeting and I will call you first thing tomorrow morning.

Q. (By Mr. Karasick): Now, what board was it, did he say?

A. His Executive Board. He said he couldn't act upon his own, he'd have to take it up with his executive board, to give us permission to talk to the people or talk on any contract, that he would call us the next morning.

Q. Did he call you the next morning?

A. I never received no call.

Q. Did you later speak to him about the same subject matter?

A. I called him on the—I believe the next morning, Monday, which would be approximately the

(Testimony of Roy A. Rhodes.)

2nd—as near as I can recall, it would be the 2nd of August.

Q. Did you speak to him then?

A. Over the phone.

Q. And what was the conversation?

A. I said, I understand that you gave the people a five cent increase. He said, that's right, and that ended our conversation right there. [51]

Mr. Berke: May the Reporter read that again? Mr. Rhodes keeps dropping his voice, and it is certainly difficult—

Trial Examiner: Will you read it.

(Question and answer read.)

The Witness: As near as I can recall.

Q. (By Mr. Karasick): Now, you say that you told him you understood he gave the people a five cent increase? A. That's right.

Q. Where did you get that understanding?

A. I got many calls from the people we had signed up in the plant.

Mr. Karasick: I see. Your witness.

Mr. Berke: I move that last be stricken as hearsay.

Trial Examiner: No, that is just the source of his information, not the conversation itself. I think I will deny the motion.

Mr. Berke: Just one moment. Mr. Trial Examiner, I am going to move that all this testimony be stricken on the ground that it goes beyond the scope of the Complaint. I find nothing in the Complaint alleging that as an 8(a)(1), if that is the

(Testimony of Roy A. Rhodes.)

purpose for which it is offered. There is not a word in the Complaint with respect to it, not even approaching— [52]

* * * * *

Cross Examination

Q. (By Mr. Berke): Mr. Rhodes, what Local did you say you were Secretary-Treasurer of?

A. The General Truck Drivers Local 980.

Q. 980? A. Right.

Q. The two occasions that you have just testified to of conversations with Mr. Martini were the only two occasions that you conferred with Mr. Martini, were they? A. It was at that time.

Q. You later on had other conversations with him, did you not? A. Short ones.

Q. You met with him at other times, did you not? A. That is correct.

Q. In fact, you had gone out to have coffee with him many [54] times, have you not, since then?

A. Not me, not too many times. I don't believe that I went out to coffee with him since that.

Q. Since that phone call back in August of last year? A. Not me, no.

Q. You have otherwise, however, talked with him, whether you went to coffee with him or not, since that time?

A. I talked to him in his office, yes.

Q. Yes, in person, face to face?

A. With other representatives, yes.

Q. But with Mr. Martini, face to face?

(Testimony of Roy A. Rhodes.)

A. That is right.

Q. Mr. Rhodes, in that conversation with Mr. Martini, didn't it amount to more like this, that you approached Mr. Martini at that time and said you'd like to go through the plant to sign people up? A. No, no, that is not right.

Q. Pardon? A. No, that isn't right.

Q. You didn't say you wanted to go through so you could organize the people and sign them up on company time and company property?

A. I asked for permission to talk to the people, which they have parking lots there.

Q. I see. Did you say you wanted to talk to them on the parking lots? [55]

A. That's right, on the company property.

Q. Well, now, wait a minute. There is more than a parking lot to the company property, is there not, Mr. Rhodes? A. That is correct.

Q. Did you specifically state the parking lot or did you say you wanted on the company property?

A. I didn't say any.

Q. And at the time you came there it was during working hours, wasn't it? A. That's right.

Q. Yes. Why did you want to talk to the people, if you had them signed up, if that wasn't your purpose? A. We did not have them all.

Q. I see. So what you wanted to do was to go through the plant then and sign up people, is that right? A. No.

Mr. Karasick: Object; that is not what the witness has testified to. It is contrary to his testimony.

(Testimony of Roy A. Rhodes.)

Trial Examiner: Continue. The witness is capable of answering, I think.

Q. (By Mr. Berke): Wasn't that your object?

A. No, that was not right.

Q. And you say you didn't tell Mr. Martini that? A. No, I didn't. [56]

Q. And, as I understand it, you didn't specify any particular place on the company property, all you said was you wanted to talk to the people on company property?

A. Yes, we very seldom ever talk to them when they are working.

Q. Wait a minute. I didn't inquire about what you very seldom do? A. That is right.

Q. If you want the question read to you, you can ask the Reporter to have it read, if you didn't understand it.

A. No, we asked to talk to them during their lunch hour, when they were off duty, on company property.

Q. You asked Mr. Martini to let you talk to the people during their lunch hour?

A. That is right.

Q. Now, you didn't say that a moment ago when I asked you? A. Well, that was the fact.

Mr. Berke: I see.

Trial Examiner: Excuse me. Were those the specific words you used, or what you had in mind, or what?

The Witness: That is practically the conversation, when we talked to him.

(Testimony of Roy A. Rhodes.)

Q. (By Mr. Berke): That is your general practice you are talking about, or the conversation that you had on this particular occasion?

A. As near as I can recall, yes. [57]

Q. Now, on direct examination you said you knew pretty much the exact words, if I understood you correctly, that were used in that conversation.

A. Not exactly. I said to the best of my knowledge.

Q. And when you were telling the conversation, you didn't state anything about having asked to talk to the people during lunch time. Now, was that part of the conversation?

A. I don't recall that.

Q. You don't recall. Now, on this same occasion, Mr. Rhodes, did you tell Mr. Martini if he allowed you to go through the plant to sign up people that you would make a bargain with him, that you would leave the employees' wages just where they were?

A. I did not.

Q. You didn't tell him that?

A. I did not.

Mr. Berke: I have no further questions. [58]

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ELMO MARTINI

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: And your full name, what is your full name?

(Testimony of Elmo Martini.)

The Witness: Elmo Martini. [63]

* * * * *

Q. (By Mr. Karasick): Mr. Martini, what is your present position with the Respondent?

A. I didn't hear the question now, Mr. Karasick?

Mr. Karasick: Read it.

(Question read.)

The Witness: I am their General Manager.

Q. (By Mr. Karasick): And how long have you held that position?

A. Since November—wait a minute. Since January 1, 1954.

Q. Prior to that time had you been associated with Sebastopol Apple Growers Union in any manner?

A. Yes, sir, I was a member of the Board of Directors, acting as Secretary of the Board.

Q. During what period of time, Mr. Martini?

A. Between December of '53 through—until my resignation, when I took over as General Manager.

Trial Examiner: You mean just for one month?

The Witness: No, it was for one year.

Trial Examiner: December of '52, then; wouldn't that be it?

The Witness: Yes, it must have been '52. That's correct.

Q. (By Mr. Karasick): Now, have you held any other position with the Respondent, other than these two? A. No, sir.

Q. The Sebastopol Apple Growers Union is a

(Testimony of Elmo Martini.)

cooperative corporation, organized and existing under the laws of the State of California, is it not?

A. That is right, that's right. [64]

Q. And it consists of various grower members?

A. Yes.

Q. Approximately how many?

A. I don't know the exact count, but I don't believe I would be too much off if I said 250 grower members.

Q. And these members are individuals or concerns which have—grow apples and market them through the cooperative, is that it?

A. Yes, that's right.

Q. Are you a member of the cooperative, grower member? A. Yes, sir.

Q. As well as the General Manager?

A. That is correct.

Q. And did you state that you were a member of the Board of Directors presently?

A. Presently, no. I resigned at the time that I took over as General Manager.

Q. I see. How many members are there of the Board? A. There are nine.

Q. How long has the Association been in existence? A. Since 1911.

Q. How long has it engaged in its present enterprise at Molino?

A. I wish you would clarify that question a little bit. Do you mean how long that the present Molino plant has been there [65] or how long the packing house was at Molino?

(Testimony of Elmo Martini.)

Q. I was thinking specifically of the cannery, but will you explain that, please.

A. Well, the packing shed has been at Molino—that is our—I believe it is our No. 6 shed—has been there since possibly the early 20's. In 1951, a cold storage plant and a cannery were erected, and the same year I believe there was some other property bought there, so that the future expansion of the concern would be at our present Molino plant.

Q. So the cannery, for all practical intents and purposes, has been operating since 1951, isn't that correct?

A. '51? That is correct.

Q. The packing shed, you mentioned before, is where fresh fruit is packed and shipped out, right?

A. Yes.

Q. And for that purpose it is contracted out to an individual contractor who hires his own employees, is that correct?

A. That's right.

Q. The cannery operation is where you as General Manager with your assistants employ persons to operate the premises, is that right?

A. Yes. [66]

* * * * *

Q. Now, one of these plants, the Plant No. 5, was converted from a packing shed to a warehouse last year, wasn't it?

A. That's correct.

Q. And the work of conversion was completed when? [73]

A. Oh, approximately during the month of August sometime.

(Testimony of Elmo Martini.)

Q. Now, what products are packed by the cannery itself?

A. We pack applesauce, pie-sliced apples, and we pack also an apple concentrate.

Q. Now, you handle some products which you have others pack for you, is that right? I am thinking of juice.

A. Only one.

Q. Isn't that right?

A. Yes.

Q. But the sauces and slices—all the packing is done at the cannery, generally speaking, with some exceptions?

A. Yes. We do as much of it there as we can.

Q. What size containers are these various products packed in? Now, I am referring—let's refer to them one by one. How is sauce packed, what size container?

A. Do you mean by that question, how do we pack it or how is it packed generally?

Q. How do you pack it?

A. In the past operations, we have only packed sauce in No. 10's and No. 303's. That would be—303's are known as a 16-ounce can, and the No. 10's are gallons.

Q. Does it also go by weight as well?

A. Yes.

Q. What is the weight of No. 10?

A. Of the gallon? [74]

Q. Yes.

A. Well, in the case of sliced apples, we like to get in there anywhere from 6½ to 7½ pounds.

(Testimony of Elmo Martini.)

Q. No, wait a minute. Are we talking about sauces or slices?

A. Well, you asked me what the weight is.

Q. Yes, I thought we were talking about sauce.

A. Well, sauce, I am not sure just what the weight of a 10 can is. I don't know.

Q. The weight of the 303 is 16 ounces?

A. The weight of a 303 is 16 ounces.

Q. All right. Now, let's get the slices.

A. The slices are packed by us in the No. 2 can and the No. 10.

Q. Now, the 2 is what weight?

A. One pound and—

Q. Is it a 20-ounce can?

A. One pound and—pound and 3 ounces.

Q. One pound and 4 ounces?

A. I believe so, yes.

Q. And the 10 can?

A. The 10, I'd say that I know we try to get up to—we like to get as much as possible in them because we sell them that way, we guarantee a certain weight in those cans, and they are quite difficult to fill, so let's say that we like to have 7 pounds of apples in them, 7 pounds of apple and liquid, or 7 pounds of apple drained, that is, draining the liquid out. [75]

Q. Would that be the total, or would it weigh more than that? A. No, that is the content.

Q. That is the net content?

A. Content, yes.

(Testimony of Elmo Martini.)

Q. I see. How many cases of finished product do you get from a ton of apples?

A. By that question would you like me to answer how many do we get or how many would we like to get?

Q. No, I think just how many you get.

A. We bounce around quite erratically on that. We like to get an average of 60 or better cases per ton.

Q. Now, what do you actually get, on an average?

A. I don't believe that we have done any better than probably 53 to 55 cases per ton.

Trial Examiner: Now, will you explain how much is in a case?

The Witness: Twenty-four—now, we are speaking of these 303's. We always refer to pack-outs in the terms of 303's; regardless of what they may be in, everything is converted back to the 303 can size.

Q. (By Mr. Karasick): That would be 20 ounces of slices or 16 ounces of sauce?

A. No, we are talking about sauce.

Q. Sauce? A. Yes. [76]

Q. All right. What about slices?

A. In slices we'll probably average 50 cases per ton. Again there is a great variance there, depending upon the quality of the apples, the amount of trimming, the thickness of the peel and size of the core. We could go on for quite a little while here.

(Testimony of Elmo Martini.)

Q. We are talking about averages, and these are——

A. So the average, let's say, is 50 cases.

Q. And again 303 has become your standard here?

A. No, in the case of sliced apples, we leave it at No. 2's, because that is the only size that we pick, that is the size that they are sold in to the housewife, that is, over the shelf at the grocery level. [77]

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Mr. Karasick: Mr. Examiner, it is my understanding that Counsel for the General Counsel and Counsel for the Respondent hereby stipulate and agree that the following individuals are supervisory employees of the Respondent: William McGuire, Sales Manager; Errol——

Trial Examiner: Give the spelling at the same time.

Mr. Karasick: M-c-G-u-i-r-e; Errol, E-r-r-o-l, Wilson, Accountant and Traffic Manager; Louis Turnage, T-u-r-n-a-g-e,——

Trial Examiner: How do you spell his first name? [79]

Mr. Karasick: L-o-u-i-s.

Trial Examiner: What is his position? Excuse me.

Mr. Karasick: Packing House Manager. Oh, pardon me. That is out of this.

Mr. Berke: Yes.

Mr. Karasick: Will you strike that, because the

(Testimony of Elmo Martini.)

packing house is not part of their immediate operation that we are concerned with.

Trial Examiner: Are you striking his name, too?

Mr. Karasick: Yes. Leonard Duckworth, Superintendent of the Cannery; Charles Williams, Cannery Foreman; Ella Herrerias, H-e-r-r-e-r-i-a-s, Cannery Floor Lady, night shift; Edna Hardin, H-a-r-d-i-n, Cannery Floor Lady, day shift; John Aguire, A-g-u-i-r-e, Warehouse Foreman.

Mr. Berke: Those are the ones we stipulate and agree to are supervisors within the meaning of the Act. [80]

* * * * *

Q. (By Mr. Karasick): Now, the cannery in the past has operated on a seasonal basis, has it not? A. Yes, sir.

Q. It begins cannery operation about when normally, middle of July? Isn't it around there?

A. In applesauce the normal—in a normal year, or let's say an average year, you would probably find canners starting up about the 25th of July, from the 25th of July to the 1st of August. Those of us, however, that have sliced successfully Gravenstein apples, which are the early apples, will start slightly earlier than that time.

Trial Examiner: Isn't that what most of the apples up here are?

The Witness: Yes, summer apples, but we have considerable later varieties that are harvested in the fall. [94]

* * * * *

(Testimony of Elmo Martini.)

Q. (By Mr. Karasick): Is it correct, Mr. Martini, that in 1951 the cannery began operations for the season on August 24th and ceased operations on November 7th?

A. That is what this paper says here.

Q. I am using it to refresh your recollection. Is that correct?

A. Yes.

Q. That paper is based upon—that I have given you has been supplied by your Counsel and is from your records, is it not?

Mr. Berke: That's correct.

Mr. Karasick: Is that right?

Mr. Berke: Yes.

Mr. Karasick: All right, I so stipulate.

The Witness: O.K.

Mr. Karasick: I have given the witness the paper to refresh his recollection, to save time, Mr. Examiner.

Q. (By Mr. Karasick): In 1952, the day shift began on July 23rd, ended November 8th? [95]

A. Yes.

Q. And the night shift on July 28th; it ended November 6th, is that right?

A. I suppose so.

Q. Well, that is what the figures from your records show?

A. Yes.

Q. Do they not?

A. Yes, that is what they show, yes.

Q. In 1953, the day shift began July 18th, ended December 23rd?

A. Yes.

(Testimony of Elmo Martini.)

Q. The night shift began July 23rd, ended November 20th? A. Yes.

Q. 1954, the day shift began July 15th—

A. December 11th.

Q. Ended December 11th, right?

A. Yes.

Q. And the night shift began July 20th and ended October 15th? A. Yes. [96]

* * * * *

Q. Thank you. Now, last year on July 31st you awarded a five cent wage increase to the employees, did you not? A. On July 31st?

Q. Yes.

A. I just checked that. It was not on July 31st.

Q. Oh, it was not? A. No.

Q. When was it, Mr. Martini?

A. I believe we have evidence here that shows exactly when it was, Mr. Karasick.

Q. Well,—

Mr. Berke: May I show the witness these records to refresh his recollection? [97]

Q. (By Mr. Karasick): Did you check these records? A. Yes, sir.

Q. Do you have any independent recollection of them? A. What's that?

Q. Do you have any independent recollection of them? A. Of the records?

Q. Yes.

A. Well, other than the time element, and when the time element was brought up I checked the records to see when it was.

(Testimony of Elmo Martini.)

Q. And what are these records, may I ask?

Mr. Berke: Would you show them to him, Mr. Karasick. I think he would rather see them.

The Witness: Yes, I would rather see them.

Q. (By Mr. Karasick): Well, I will show them to you; what are they?

Mr. Berke: Why not hand them to the witness?

Mr. Karasick: I think it is quite evident I am examining this witness. Now, I have records here that Counsel has just given me——

Trial Examiner: Are you asking your question of Counsel or the witness?

Mr. Karasick: I am asking the witness what records these are.

The Witness: They are payroll records.

Q. (By Mr. Karasick): And they are payroll records I find for four individuals? [98]

A. Yes.

Q. Why those four individuals, any reason?

A. No, just that he's just brought over four. There's others.

Mr. Berke: If Counsel wants an explanation, it is a case of not bringing all the records. He took—I think you will find out, the alphabet—"A" and "B"—Mr. McGuire was asked during the noon hour to get the records to show as to what happened on that pay increase and the records will all be the same. If you want them all brought in, we'll be glad to bring them all in.

Q. (By Mr. Karasick): These are payroll records for Elizabeth Augustin, A-u-g-u-s-t-i-n; Inez

(Testimony of Elmo Martini.)

Brock, B-r-o-c-k; Goldie Mahoney, M-a-h-o-n-e-y; and Eleanor Bertossi, B-e-r-t-o-s-s-i; right?

A. Yes.

Q. Do you need all four records to check your recollection? A. No, no, only need one.

Q. Let's take just one of them then, and I will give you the record of Elizabeth Augustin. Now, will you tell us from examining that record when the increase was given?

A. O.K. Here's your payroll period ending 8/7—on 7/24, the pay period ending 7—that's July the 24th. The rate of pay was 95 cents per hour. Immediately after the 24th it went to a dollar.

Q. How immediately afterwards, you mean that week? [99]

A. No, immediately, because that's when this particular phase of it was called to my attention, as soon as the checks were made.

Q. What shows on that record that it was immediately afterwards—anything?

A. Well, no, nothing shows on here that it was immediately afterwards?

Q. Nothing at all?

A. It commences on Monday of the week ending the 31st.

Q. But there is nothing on that record that shows when that wage increase began, is there; there is only one showing, that is, of that week, at least some time of that week?

A. The wage increase began immediately after the pay period of the 24th was paid out.

(Testimony of Elmo Martini.)

Q. Now, apart from these records, one of which I have just shown you, do you have any independent recollection of when that wage increase was granted? A. Yes.

Q. And what is your independent recollection, Mr. Martini?

A. As soon as the employees had received their checks of the week ending the 24th, it was called to my attention by some of the night workers, all female workers, that they had not received their nickel per hour increase. [100]

* * * * *

Q. (By Mr. Karasick): Do you have something more you want to say about this, Mr. Martini, do you want to explain any further this wage increase? A. Yes.

Q. Would you do so, please.

A. Yes. I think it should be explained, after the checks of the pay period of the 24th were issued I was approached by some of the employees that they had not received their nickel per hour raise. Now, that came about when I asked what the pay—what the people had received for compensation the year previous, [103] I was told by my office that it was 85 cents they were receiving on the day shift, and I have always been accustomed to having a nickel differential between day and night. Therefore, I moved my pay from 85 to 90 cents, thus giving the people at the beginning of the season 90 cents, and I thought 95 would have given the night people a nickel. Now, when these people ap-

(Testimony of Elmo Martini.)

proached me they said that you gave the day shift a nickel increase but you didn't give it to the night shift, and I inquired and checked the record and found that they were right and went back and told them that since I was in error, that they would automatically have their nickel an hour, which would put them from 95 cents, that is at night, to a dollar, and thus I moved—and had the nickel differential, and moved the day shift people to 95 cents and kept my nickel.

Q. So the day shift got a nickel and the night shift got another nickel, is that it?

A. No, the day shift got a dime, Mr. Karasick.

Q. I see, a dime? A. Yes.

Q. And the night shift got a nickel? I see.

A. Yes.

Q. Now, when was the effective date of that increase?

A. The effective date was the end of July. It was for the week ending, I believe, July the 31st. I just saw it on the record there. I think it was then the pay period was. [104]

Q. And the date the increase was granted was the week prior to that?

A. The date when the increase was granted was immediately after the checks were issued to the people. That's when it was called to my attention.

Mr. Berke: On what day?

The Witness: I don't know when our payday is, whether it is Monday or a Tuesday.

Q. (By Mr. Karasick): As a matter of fact,

(Testimony of Elmo Martini.)

you have no independent recollection of the day that was granted, do you, and your records don't show, do they?

A. It was on the day that the checks were issued for the period of the 24th, that I know, Mr. Karasick. That's when it was called to my attention; immediately upon receiving the checks, these people approached me and brought my attention to it.

* * * * *

Q. (By Mr. Karasick): Mr. Martini, why was Mrs. Storey discharged?

Do you have the question in mind, Mr. Martini?

A. Yes. For cause.

Q. Well, what does that mean? What was the cause?

Mr. Berke: Do you understand the question, Mr. Martini?

Trial Examiner: Will you explain why you are hesitating? If there is some reason—

The Witness: Well, I have gone through that at quite some length, and it is quite lengthy. There is one thing that hinges on another, so therefore—

Q. (By Mr. Karasick): All right. Will you tell us the reasons for the discharge of Mrs. Storey?

A. She was discharged because I was in the cannery—

Q. I am sorry; she was discharged what?

A. During the day that I was present in the cannery office, and just below me, below the—I will have to use your—should use your diagram here. I was standing on the—

(Testimony of Elmo Martini.)

Trial Examiner: Which number is that? [112]

The Witness: That's—

Mr. Karasick: 23, I believe.

Trial Examiner: 23?

The Witness: Yes, 23. I was standing on the— I was going in to see Mr. Duckworth and standing on the deck over the—on the deck at the lab, there is a little balcony there just outside of the lab which is possibly ten feet above the floor level. I saw Mrs. Storey, while the plant was running, down just below me with a group of people. I asked Mr. Duckworth what she was doing there, and he told me that she had clocked out, and I asked him if she had clocked out why she wasn't leaving the building; so he went down and told her to leave, and when she refused to leave he told her that she would be discharged, because she had this group of people there, which were in a very, very precarious position. We have changed the plant just because of it, just because the thing was very, very dangerous to the employees. It was no place to be standing around, and I wanted no one to stand around in that position.

Q. (By Mr. Karasick): Now, let me get this clear in my mind, Mr. Martini. I understand you to say that you had physically changed the plant because of this incident?

A. Not wholly, but it was one—we had to change that, because it wasn't a very safe thing for us to—regardless of what else we have done, that particular portion of it was going to be changed. [113]

(Testimony of Elmo Martini.)

Q. Yes, so the change was not because of this, was it, Mr. Martini?

A. Well, it was because of the danger that there was involved to people there. Now, we didn't want a fork-lift and women all mixed up in one little area there. [114]

* * * * *

Q. (By Mr. Karasick): Now, you say there was danger connected with this?

A. I thought so.

Q. All right. What was it that made you think there was a danger connected with it, what was the danger? [116]

A. There was a fork-lift that picked up a tank that weighs approximately 2,000 pounds, at one point just north of the—of the specking table. It is not a specking table, we just call that a—that is the inspection belt.

Q. Now, will you mark where the fork-lift was.

A. The fork-lift works all through here, all through this area, from directly south, into the point here, because we do store tanks over in here, so it would work halfway between the inspection line and on through the two vacuum bells which are halfway beyond the blanching tank to the north of the plant.

Q. I don't—perhaps I have confused you, Mr. Martini. I don't mean generally; where did the fork-lift operate that day, where was the fork-lift when you saw these women, in relation to them?

A. The fork-lift was——

(Testimony of Elmo Martini.)

Mr. Berke: You mean at that precise moment, or do you mean that day?

Q. (By Mr. Karasick): That moment of time, when this group was there, where was the fork-lift in relation to it?

A. Well, I saw the fork-lift at that moment back on from this point.

Q. Now,— A. Back.

Q. Now, show us where.

A. From the point where they pick up a 2,000 pound tank here, [117] just north of the inspection table—you back around this way and then drive forward.

Trial Examiner: Can you say not “this way,” but toward what?

The Witness: Toward the door. He will back out toward the door, toward the exit door, and since the place was very, very congested, he drives onto the blancher and then back toward the—back toward the lab, and then swings back around and puts the tanks under the blancher bells, or under the vacuum bells.

Q. (By Mr. Karasick): Now, have you finished your answer? A. Yes.

Q. Now, are you telling us, Mr. Martini, what the normal operation of the fork-lift is, or what it was at that particular moment of time, that day?

A. That fork-lift is doing that almost at all times during the day. It goes from—it carries out that cycle.

(Testimony of Elmo Martini.)

Q. So you are telling us what the cycle is, is that right?

A. And it is doing that within—I believe we keep it—in fact, I'm sure of it, our blanching time is 17 minutes per tank, and there are two tanks, so he is making a maneuver like that every six or seven minutes.

Q. I see. Now, let's get to this day. Was there anything different about the fork-lift that day, or its operation, than there was on—any other day?

Mr. Berke: Have we got in the record, Mr. Karasick,—I didn't mean to interrupt you, but the day that is involved here?

Mr. Karasick: Well, we will get the day.

* * * * *

Q. (By Mr. Karasick): Mr. Martini, what was the date?

A. I don't know. You will have to look up the record on that one, too.

Mr. Berke: Well, I will stipulate, if you want to, it was September 25th, and if you have got the calendar he can look at the day and say what day of the week it was. [119]

* * * * *

Trial Examiner: All right. Were you stipulating as to the date?

Mr. Karasick: The date? I am perfectly willing to stipulate. I think that is right, from my recollection. If it is wrong, we can correct it. I will stipulate it is September 25th.

Q. (By Mr. Karasick): Was that a Saturday, Mr. Martini, after looking at the calendar?

(Testimony of Elmo Martini.)

A. Yes.

Q. Is Saturday different than any other day there?

A. Just as crowded, just as crowded.

Q. Operations are the same on Saturday as any other day, aren't they? A. Yes.

Q. The fork-lift operates in the same manner?

A. Yes, exactly.

Q. Employees around the same number, right?

A. Yes.

Q. All right. Now, what was so dangerous about this fork-lift, with respect to the women?

A. It could run over them.

Q. Could?

A. Not only run over them, the fork-lift—that wouldn't be as much danger as a tank. After all, the fork-lift could—was lifting to its top capacity and those fork-lifts going over a steel grate sometimes could topple over and dump the entire load, and you don't know which direction it is going to go, could go to the right or could go to the left. It would depend upon what wheel sunk through the steel grates that are across a gutter that we have, right down the center of it.

Now, we have had fork-lifts in there before; fortunately, the tank was not at the high point.

Q. Now, how long did you see her talking there?

A. Oh, ten, fifteen minutes.

Q. And——

Trial Examiner: Was this before—Excuse me. Go ahead.

(Testimony of Elmo Martini.)

Q. (By Mr. Karasick): Then what did you do?

A. Mr. Duckworth came back up and he said that she wouldn't leave, and I told him to be sure and go down and tell her to leave. [121]

* * * * *

Q. I didn't get Mr. Duckworth in this picture before. How does he come in?

A. Well, I sent him down there to have her move along.

Q. When did you send him down there?

A. After the ten minutes that she had been standing there.

Q. I see. You saw her there for ten minutes, then you sent Duckworth down, telling her to go on?
A. Yes.

Q. Duckworth went down? A. Yes.

Q. He came back? A. Yes.

Q. What did he tell you?

A. Told me she wouldn't leave.

Q. She wouldn't?

A. Yes. So I told him to go back down and be sure that she left.

Q. And then what did he do?

A. Went down and he told Mrs. Storey to leave the premises.

Q. And she was there for about fifteen minutes altogether then, is that correct?

A. Fifteen or twenty minutes, yes.

Q. Fifteen or twenty minutes?

A. Yes. I would say that or longer.

Q. Would you say closer to twenty than fifteen?

(Testimony of Elmo Martini.)

A. Yes.

Q. I see. During this period of time, did you go out and talk to Mr. Storey about this?

A. Yes, shortly after that, yes.

Q. And do you remember that in talking to Mr. Storey you told him to go in there and fire his wife?

A. No, sir.

Q. I beg your pardon?

A. I did not say that.

Q. Oh, what did you say, Mr. Martini?

A. I told him I had fired his wife.

Q. Oh, you had fired his wife? A. Yes.

Q. This was before she left, though?

A. No, she had left.

Q. Oh, she had left? A. Yes.

Q. Why did you tell Mr. Storey that?

A. Because I had also had him into my office and told him that I didn't want him to leave his post, so I told him that I had fired his wife, and that the next time I had a report that he had left his post, that I would fire him.

Q. How long after seeing Mrs. Storey there did you talk to Mr. Storey?

A. Oh, after I first saw her there? [123]

Q. Yes. A. I'd say a half hour.

Q. I see. So very shortly afterwards you went out and told Mr. Storey this? A. Yes. [124]

* * * * *

Q. (By Mr. Karasick): Now, what was the reason then for Mrs. Storey's discharge, Mr. Martini?

Mr. Berke: Just a moment; asked and answered.

(Testimony of Elmo Martini.)

Mr. Karasick: Succinctly put, is what I want. I want a reason from this individual as to why Mrs. Storey was discharged.

Trial Examiner: You mean such as the company might have kept on their records as a specific ground for discharge?

Mr. Karasick: That's right.

Trial Examiner: If there is such a word, Mr. Martini can give it.

The Witness: Well, the reason for her discharge was calling together a congregation of women and standing in the alleyway. Now, I had prior to that time talked to Mrs. Storey, talked to her as a gentleman. I had Mrs. Storey and a Mrs. — I believe her name is Lila Layman, into my office with Mr. Duckworth, and I told her at that time that I wanted no more occurrences of that. I fairly and squarely warned her.

She did it on another occasion; therefore, it was cause for discharge. [125]

Q. (By Mr. Karasick): What did she do on another occasion, Mr. Martini?

A. On a previous occasion?

Q. Yes.

A. On a previous occasion she — well, again I was in the cannery in a conference with Mr. Duckworth. She had called a group together and then called me down, and wanted to talk to me, at the time that the day shift was going back from the lunch period; they had already — it was prior to their — some had not clocked in, others had clocked

(Testimony of Elmo Martini.)

in and were at their posts, ready to run the cannery, the cannery was ready to start. At that point I went down there and she had—she asked me pointblank if I would meet with Mr. Grami and Mr. Rhodes.

Q. Who are Mr. Grami and Mr. Rhodes? Would you identify them? They are Union representatives?

A. Yes. Mr. Grami is with the A. F. of L., and Mr. Rhodes, I believe, is Secretary and Manager.

Q. They are representatives of the Union involved here, aren't they? A. Yes.

Q. Yes. Go on.

A. I told her at that point that I would not meet with either one of them as the case, that is, the labor case was in the hands of the N.L.R.B., and they would shortly render a decision about what our plants would do. I told the girls that Mrs. [126] Storey said that if we didn't meet with them the girls would walk off, including herself, and I asked—said now, Girls, the best thing for you to do is to go back to work and forget the issue, and that's it, they did. [127]

* * * * *

Q. (By Mr. Karasick): Why was Elsie Dickerson discharged, Mr. Martini?

A. I did not discharge Elsie Dickerson. You have the record on that, but the story that I hear is that she was discharged for defacing or marring apples. [130]

* * * * *

Q. Why was that ground for discharge?

(Testimony of Elmo Martini.)

A. Well, because it is a—the story that I have, which I am [131] sure is correct, was that our machines removed cores——

Q. What's that?

A. Removed peels and cores from the apples. A trimmer trims off bruised tissue and, oh, possibly a worm stain that hasn't been cut off, and Mrs. Dickerson was intentionally inserting into the opposite side of the apple the core that had already been removed. Now, in that particular instance, the apple goes up through to the seed celling machines and these machines remove what the corer has not removed; in other words, for sliced apples we have to remove the seed cell. Now, when an apple has a core in it from that direction the seed celler will pick up that core and have seed cells all over it, into the—they could get into the product, and that could downgrade that particular lot of sauce; it could be a thousand cases, and it will downgrade it to a second grade or a grade that you may have to sell at possibly 50 percent of the general market. In fact, that is——

Q. Has that ever happened to you?

A. To have to sell apples at the lower price?

Q. Has it ever happened that you had to downgrade a product for that reason?

A. We have had to downgrade it for that reason, yes.

Q. You have? A. Yes.

Q. In the past? [132] A. Yes.

* * * * *

Q. So that the only reason Mrs. Dickerson was

(Testimony of Elmo Martini.)

discharged was because she had done this to an apple and this would endanger the quality of the product, is that what you are saying?

A. Yes, that's correct.

Mr. Berke: Just a moment, just a moment. That misstates the evidence. I object to it; "done this to an apple" makes it appear as though it is one apple.

Trial Examiner: I don't understand the objection, Mr. Berke.

Mr. Berke: I object to his misstating the evidence, sir. [133]

Trial Examiner: The witness just confirmed it is correct.

Mr. Berke: That it was done to only one apple? I didn't understand that. If the witness said so, all right.

The Witness: No, it wasn't done with only one apple.

Q. (By Mr. Karasick): Well, how many apples were involved, Mr. Martini?

A. Well, it was done on two occasions, that she would have——

Q. Two apples?

A. No, not two apples, two occasions. We don't know how many apples. There were several apples seen, there were more than one apple, I assure you.

Q. How many apples was this done to?

A. I am not acquainted with the full extent of it, but there were several apples that were seen.

* * * * *

(Testimony of Elmo Martini.)

Q. When was Mr. Duckworth made Superintendent at the Plant, Mr. Martini? Last season was the first time, was it not?

A. I don't remember the exact date.

Q. No, but it was last season, wasn't it?

A. Yes, it was during the last season. It wasn't right at the beginning of it, it was approximately a week or so after the season——

Q. Now, who was the Superintendent before him? A. Darrel Beavers.

Q. What was Duckworth's position before he took Beavers' job?

A. He was our technician, and I would have classed him as Assistant Superintendent.

Q. He had been Assistant Superintendent?

A. An Assistant Superintendent and Lab Technician.

Q. To Beavers, is that it? A. Yes.

Q. And then when Beavers was no longer there, then Duckworth? A. Yes, that's right.

Q. Do you remember about when Beavers left and Duckworth took over?

A. Oh, I don't remember the exact date. It was very short—right immediately after the beginning of the season.

Q. In July?

A. Yes, it was in July, I am sure of that. Probably around the 20th. [151]

Q. I see. After you had actually begun operation of the cannery then, is that right?

A. I don't recall whether we had operated yet or

(Testimony of Elmo Martini.)

not. I don't recall. I do not believe that we had operated the cannery yet when Darrel Beavers left our employ.

Q. Well, in any event, am I right in this, that Beavers had the same duties that Duckworth did, Duckworth just succeeded Beavers' position?

A. Duckworth just what?

Q. Succeeded Mr. Beavers' position?

A. Yes, yes.

Q. There is no difference in authority or responsibility, right?

A. No, no, with the exception that Duckworth is a technician in that line of work and he has a little bit more knowledge of the fine points of the actual canning and processing of apples.

Q. But that didn't affect the supervisory authority or responsibility? A. No.

Q. That remained the same, is that right?

A. Yes.

Q. As Beavers' had been? A. Yes, sir.

Q. Now, on October 15th, 1954, — I think that date is already shown in the record — [152]

A. On October what?

Q. 15th. A. Yes.

Q. You reduced operations to one shift, is that correct? A. Yes, that is correct.

Q. Now, in 1952 and 1953, you laid off the night shift and kept the day shift going, is that right?

A. That's correct.

Q. In 1954, you laid off employees between the two shifts, is that right? A. Yes.

(Testimony of Elmo Martini.)

Q. You selected some from one shift and some from another? A. Yes, yes.

Q. And do you know the—and you held a meeting of the employees in the warehouse?

A. Yes.

Q. On the afternoon—at the close of the first shift, and right after the second shift came on, to notify the employees of the lay-off, is that correct?

A. Yes.

Q. At that meeting, or shortly thereafter, you issued a letter to the employees, telling them, explaining in effect about the lay-off, did you not?

A. Yes.

Mr. Karasick: I have asked the Reporter to mark as General [153] Counsel's Exhibit 25 for identification a document on the letterhead of Sebastopol Apple Growers Union, bearing the date of October 14th, 1954, addressed to all employees, and ask you if that is the letter to which you refer.

A. Yes, that is correct, this is the letter.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 25 for identification.)

Mr. Karasick: I offer the document in evidence as General Counsel's Exhibit 25, and is my recollection correct, Mr. Examiner, that I have not yet offered General Counsel's Exhibit 24? If I haven't, I would like to offer it at this time. [154]

* * * * *

Q. (By Mr. Karasick): You reduced operations to one shift on October 15th, 1954, is that

(Testimony of Elmo Martini.)

correct? A. That is correct.

Q. Now, that shift was one which was selected between day and night shift employees previous to that time, right?

A. What was that now?

Q. That shift was selected from employees who up to that time had worked on both the day and night shifts, right? A. Yes, that is correct.

Q. What you did then was retain a single shift and operated only during the day units of a night shift—you didn't have a shift which operated at night any more, is that right?

A. That is right.

Q. The letter that you hold in your hand, General Counsel's Exhibit 25, bears the date of October 14th, 1954, does it not? [156]

* * * * *

Q. (By Mr. Karasick): Did you want to explain something? A. Yes.

Q. In regard to the question?

A. Yes. When you asked me if the night shift was taken off in 1952 and '53—

Q. Yes? A. —I said yes.

Q. Yes.

A. That is correct, isn't it? Now, did you mean there was only the shift—were only the night shift employees removed?

Q. Primarily the night shift.

A. Is that what you meant?

Q. That is exactly what I meant.

A. I don't know.

(Testimony of Elmo Martini.)

Mr. Berke: Yes, well, that's the point.

Q. (By Mr. Karasick): You don't know?

A. No, I don't know. [157]

* * * * *

Q. (By Mr. Karasick): Your testimony is you don't know?

A. I do not know. I'd have to check the record on that, if it is available. Those are difficult records to check, with such a revolvment of labor in that organization. We will check through; if there are, we will certainly get them.

Mr. Berke: Mr. Karasick, we will do our best.

Mr. Karasick: Will you?

Mr. Berke: Just any records you want, just ask for them. [159]

* * * * *

Q. (By Mr. Karasick): You will recall yesterday I asked you to check, and you were good enough to indicate that you would, with respect to whether or not in 1952 and 1953, at the time you reduced operations to one shift, you did not lay off the night shift and continue working with the day shift for the balance of the season. Did you make such a check? A. Yes.

Q. What is the answer?

A. I found that in the past there, the people were picked out in exactly the same way, both——

Q. I wanted to know whether or not it is true, Mr. Martini, that in 1952 and 1953, when you reduced the operations to one [168] shift——

A. Yes.

(Testimony of Elmo Martini.)

Q. —you did not lay off the night crew and continue working altogether or substantially with the day crew—when I say “substantially,” I mean you laid off the night crew and only used to fill in for people that left on the day crew, never got back on the night crew in those years?

Mr. Berke: I wonder if the witness understood the question. It puzzles me. There is something wrong with the syntax, the way it starts out, and then—

Mr. Karasick: Well, I will be glad to rephrase the question, surely.

Q. (By Mr. Karasick): The question I am posing to you is this, Mr. Martini, and again, if it isn't clear, please tell me. I don't want you to be confused.

In 1952 and 1953 you reduced the operations to one shift, right? A. Yes.

Q. In doing so, is it not true that you laid off the night shift as such and continued working with the day shift? A. It is not true.

Q. It is not? A. No.

Q. All right. Now, what is true, Mr. Martini?

A. There were employees in both 1952 and 1953 that, after the [169] lay-off, went to work on the day shift, that had come from the night shift.

Q. Yes, and they were employees who filled in for vacancies that occurred after that time on the day shift, isn't that true?

A. No, no, right at the time.

Q. You mean that they were employees selected

(Testimony of Elmo Martini.)

from lay-offs, or laid off on both shifts in 1952 and 1953? A. Yes.

Q. Your records show that, do they not?

A. Yes, yes. [170]

* * * * *

Q. Thank you. Now, I think that there are some twenty employees whom you say quit on the night of October 15, 1954, is that right?

A. I only have it by reports that were given me by supervisors and looking at the record there I would say yes.

Q. I don't want to take advantage of you by numbers, I will just call your attention to the exceptions to the Regional Director's Report on Challenged Ballots. You remember there is an appendix to that document which lists employees whom the company alleges quit, is that right? A. Yes.

Q. Let me show it to you.

A. That's right, I remember the number. [179]

Q. You remember the number — 20, weren't there? A. Yes.

Q. And they are named in that document?

A. Yes.

Q. Now, do you know whether or not any of that 20 quit, of your own personal knowledge?

A. I know that they had not reported to work, to complete their shift that night.

Q. No, my question to you, Mr. Martini—

Mr. Karasick: And I move to strike the answer as not responsive, please, because this gets into the question—

(Testimony of Elmo Martini.)

Trial Examiner: No, I think that is partial knowledge on his part. I will let it stand.

Mr. Karasick: All right.

Q. (By Mr. Karasick): Did any one of the 20 named employees personally tell you at that time, or at any time, that they had quit work?

A. None of the employees, Mr. Karasick, actually told me that.

Q. All right, that answers my question.

A. But, if you don't mind, I'd like to explain a little further. I know a little bit more than that.

Q. If you want to explain, you go right ahead.

A. My supervisors informed me that several told them if they weren't going to work Monday there was no use working that night, and they left. [180]

* * * * *

A. After these shifts started up that evening, that afternoon after the lay-off, I would estimate now that we ran with a 75 percent crew. The crew, the full crew wasn't there.

Q. That's only your estimate, right?

A. Well, I'm sure of the figures, because that's about what we have found, chasing these records down, over the past seven or eight months, that's all the people that turned up to work; and we knew about it, and those particular items were pointed out to me at the time, that so-and-so said if she wasn't going to work Monday she might as well leave them. [182]

* * * * *

(Testimony of Elmo Martini.)

Q. (By Mr. Karasick): Now, after that—Strike that.

During the 1954 season the Respondent sent apples to the Sebastopol Apple Co-op, another company, for processing and putting in cans, is that right? A. That is correct.

Q. And do you recall that during the 1954 season the co-op canned some—in excess of 80,000 cans—cases for you, and that of these there were in excess of 65,000 303's, and the balance of 15,000, in round figures, being 8-ounce? [191]

A. I recall that the figure is somewhere around that figure, yes.

Q. Again would you check and let me give you the exact figure so that you can make an exact check, if you will, and again with Mr. Berke's consent.

The co-op canned 80,587 cases during the 1954 season for you—and by "you" I mean the Respondent—and of these 65,322 were 303's and the balance of 15,264 were 8-ounce, that's right.

When did you begin taking applications for new employment this year?

Mr. Berke: Just a moment. What is the relevancy?

The Witness: Oh, I don't know.

Mr. Berke: Wait a minute—as to this year? We are only concerned with last year, and we have already gotten background stuff in, and nothing to do with last year's events either but—

Trial Examiner: I am not sure that I quite understand the picture; with reference to what, you

(Testimony of Elmo Martini.)

mean the calendar date or do you mean with reference to the time the cannery was started?

Mr. Karasick: I think I will withdraw the question and get at it more directly, so that there will be no misunderstanding about it.

Q. (By Mr. Karasick): Are you using this year for the first time new application forms, Mr. Martini? [192] A. A new application form?

Mr. Berke: Now, just a moment.

Q. (By Mr. Karasick): Is that a new application form?

Mr. Berke: Just a moment. I am going to object to it. It's irrelevant and immaterial as to whether they are using a new form or not.

Mr. Karasick: I think it may or may not, depending on the witness' answer.

Mr. Berke: Well, this is a fishing expedition, and I'm certainly——

Mr. Karasick: Well, let's show it is not a fishing expedition. Here is the document I am going to show him, Mr. Berke.

Mr. Berke: Even so, I think it is irrelevant. There is nothing in the Complaint about the alleged violation, if that is what Counsel is getting at. If it isn't, it certainly isn't background; it is foreground, if anything, and I don't understand that the Board as yet has ruled that foreground is applicable.

Mr. Karasick: I don't want Mr. Berke to be taken—to be under any misapprehension as to my intentions now or at any time, Mr. Hemingway, or anyone else here. I intend to ask the witness ques-

(Testimony of Elmo Martini.)

tions about this document, which is an application form, I am informed, and just recently came to my attention within the last couple of days as now being used by the company. If it is being used by the company, and I think the [193] witness will so testify in regard to it—if he doesn't, we have witnesses who will—I then intend to amend the Complaint to allege as an unfair labor practice——

Mr. Berke: I certainly will object to it. It will be absolutely incompetent and improper, and Mr. Karasick ought to know better.

Mr. Karasick: On what ground, I wonder, Mr. Examiner, would it be incompetent or improper?

Mr. Berke: Because, to amend at this late date on a ground which has nothing to do with the events that transpired last year, which is the basis of this litigation, is certainly improper.

Mr. Karasick: I would like to——

Mr. Berke: And General Counsel is making a case as he goes along day by day. That is what is improper.

Mr. Karasick: It isn't only that that we depend on, Mr. Examiner; I beg to point out that this is a continuing violation.

Trial Examiner: Do you have a form of application that was used prior, in prior years?

Mr. Karasick: No.

Trial Examiner: Is your question whether or not this form of application is the one which was used?

Mr. Karasick: No, my question is now whether this form of application is presently being used.

(Testimony of Elmo Martini.)

This is a continuing [194] violation alleged, against the employers named in this Complaint, that violation being with respect to their employment and continued employment by this Respondent. It is our contention that this application on its face and per se is a violation of the Act. If the application is being used by this Respondent, it is perfectly proper to put in the evidence with respect to that and amend the Complaint.

I may state further that this application first came in my hands on Sunday of this week. It is the first time I knew of it.

Trial Examiner: Well, apparently it was represented to you as something new that hadn't been used before.

Mr. Karasick: That's right, but it is being used with respect to the employees the company is now hiring, and some of these employees are employees who worked for it previously and had a continuing expectation of employment.

Trial Examiner: Well, would you mind asking preliminarily whether or not any application form was used in prior years?

Mr. Karasick: No, I have no objection to that.

Trial Examiner: And whether or not, if there was one, it was in this form.

Mr. Karasick: No, I don't have any objection.

Trial Examiner: If you will put it in that form, I will appreciate it.

Mr. Karasick: Surely. [195]

(Testimony of Elmo Martini.)

Q. (By Mr. Karasick): Will you answer the Examiner's question in that regard?

A. We had another form, a very short form, with the name and—I really haven't looked at it too carefully, but there wasn't all the information on there that we wanted, and so we—

Mr. Berke: Well, the point is, did you have another form, application form?

The Witness: Yes, yes.

Mr. Berke: All right.

Q. (By Mr. Karasick): When did you begin using this form?

Mr. Berke: Just a moment. I object to that.

Mr. Karasick: I will ask—

Mr. Berke: Going to object on the ground—

Mr. Karasick: Will you wait until I have finished the question, Mr. Berke, please, and as soon as I finish I will pause and give you a chance to object.

Trial Examiner: Incidentally, I can tell you right now, Mr. Berke, the fact that it occurred this year will not make any difference in my ruling. It doesn't come within the same principle of evidence as the situation where someone makes repairs to an instrumentality that causes an accident.

Mr. Berke: I am not sure I follow you, Mr. Trial Examiner.

Trial Examiner: Well, never mind. I am going to permit the question to be asked.

Q. (By Mr. Karasick): I hand you this docu-

(Testimony of Elmo Martini.)

ment which has been [196] marked General Counsel's Exhibit 26 for identification, Mr. Martini, and ask you if that application form was used this year for the first time?

Mr. Berke: Just a moment. I object to it as incompetent, irrelevant and immaterial and beyond the scope of the issues in this case.

Trial Examiner: Overruled.

Mr. Berke: And if it is going to be gone into, Mr. Trial Examiner, I am going to ask for a continuation, because I am frankly taken by surprise.

Mr. Karasick: You are no more surprised than I was to get it, so we are both equally surprised.

Trial Examiner: I am not going to rule on the motion at this time for a continuance because I don't believe that it will be essential as yet. If, after Counsel has had an opportunity to speak to the witness, he feels that it may be necessary, I will consider it again, but at this time, however, I will deny any continuance.

Q. (By Mr. Karasick): Would you answer the question, Mr. Martini; do you remember? [197]

A. No.

* * * * *

Q. (By Mr. Karasick): Do you know the date that you began using this application?

A. No, I do not.

Q. Mr. Martini? A. I do not know.

Q. Was the first time this year?

A. Yes, sir.

Q. What month?

(Testimony of Elmo Martini.)

A. Let's see, this is July. It was in July, I'm sure of that.

Q. In July? A. Yes.

Q. Are you sure it wasn't in June as well?

A. I don't think so. It seems to me like we have been taking applications for approximately three weeks, three weeks—this is—must have started along the first of July or the end of June.

Q. I see.

A. I can check, though, if that is what you want.

* * * * *

Q. I hand you General Counsel's Exhibit 26 for identification, is that correct?

A. Yes, this is the form. [198]

Q. That is the one you have been using?

A. Yes.

Q. And you are using it now?

A. That's right.

Q. And all applicants for employment are required to fill out that form, are they not?

A. Yes.

Mr. Karasick: I offer the document in evidence as General Counsel's Exhibit 26.

Mr. Berke: I object to it on the ground it is irrelevant and immaterial and incompetent, and beyond the scope of the issues involved, and it is not a part of the Complaint. There is no allegation pertaining to it in the Complaint by any stretch of anybody's imagination.

Trial Examiner: I will receive the exhibit in

(Testimony of Elmo Martini.)

evidence. I am not passing, in so ruling, upon the weight to which this document is entitled. [199]

* * * * *

Q. (By Mr. Karasick): Mr. Martini, I hand you General Counsel's Exhibit 23, which you will recall is the diagram of the cannery. [201]

A. Yes, sir.

Q. And, for the record and the Examiner, I would like to take you through the operations of the cannery in, first, the operation required when you can slices. A. Yes.

Q. And then, when we get through with that, we will go to the operation where you can sauce. Is that clear? A. Yes.

Q. Now, the apples—holding this diagram up so that the words "39 trimmers" are in the upper left corner, we are looking at the chart, the diagram from that angle, are we not? A. Yes.

Q. Now, the apples are dumped right outside of a point called the flume on that diagram, are they not? A. That is right.

Q. And then they are dumped into the flume?

A. Yes, they are elevated up to the flume and dumped into the water flume.

Q. Yes. Now, that flume carries water and runs down into the plant? A. Yes.

Q. It is really a conduit, isn't it?

A. Yes, it is a conveyor.

Q. A water conveyor? A. Right. [202]

Q. The apples come in this water, and on either side of the flume stand peelers?

(Testimony of Elmo Martini.)

A. No, on one side of the flume stand peelers.

Q. I see. Now, as you are looking at the chart now, would it be at the upper part of the words "13 peelers" or the bottom part?

A. No, the bottom part is where the peeler operators stay.

Q. Now, peelers are machines which are operated by peeler operators, is that right, by women?

A. Yes.

Q. How many peeler machines are there?

A. Thirteen.

Q. How many apples does each machine handle at one time?

A. Anywhere from 70 to 80 a minute.

Q. But at one given point of time?

A. Oh, two.

Q. A peeler has cups on it?

A. A peeler has four cups, and there are two apples fed to it at a time, two and two.

Q. They are fed to all four cups, right?

A. No, they are fed two cups at a time. The cups work this way, two of them come out while two of them are going in. These two go in and two others come out.

Q. I see. So that one peeler operator can handle the four cups? [203] A. Yes.

Q. Is that right? A. Yes.

Q. And what does she do, take them up with one apple in each hand, put them in the peeler cup, the machine takes it, and then what does it do?

(Testimony of Elmo Martini.)

A. Then the machine goes into what we call—it takes the apple in the cup, takes it in, and the cup has an upward movement, I believe. I don't know, I'm not sure whether the cup moves upward or whether the spike comes down and catches it, and then a knife goes around the apple—the apple is spinning, of course,—

Q. Yes.

A. This is a spindle, and the apple spins and the knife cuts the peel off, and at the same time, while the apple is spinning, a coring knife cuts the core out.

Q. Yes, and sometimes those coring knives don't operate properly, and the core remains in the apple?

A. Portions of it, yes.

Q. Sometimes a whole core will be in and have to be removed later on, right? A. Yes.

Q. All right. Now, after the apple comes out of the machine, does it—is it dumped by the machine, or does the operator take it out by hand, after it is peeled? [204]

A. No, it is dumped by the machine.

Q. It is peeled and cored; if the machine works properly, it is peeled and cored, dumped, and to the left of where it says "peelers" there is a runway or conveyor?

A. There is another—there's two, there are two conveyors.

Q. Are they water or belt conveyors?

A. One is belt and one is water.

(Testimony of Elmo Martini.)

Q. And are the apples dumped on either one of those?

A. No, sir, they are not, the apples are dumped on top, on top of the conveyor. There is a grate over the top of it, and on either side of it there is an opening, so that every apple—

Q. Yes?

A. —it is trimmed, at that point it is picked up, and then the grates—

Q. Who picks it up at that point?

A. The trimmers.

Q. The trimmers pick up each apple individually, right? A. Yes.

Q. They are standing back of the peelers, where it says "39 trimmers" here, is that right?

A. Yes.

Q. The apples come out of the peeling machines, roll down to this grate? A. Yes.

Q. Where the trimmers stand? [205]

A. Yes.

Q. The trimmers take up each apple, and what do they do?

A. They pick—they pick up each apple and they will trim off deep bruise marks, or they will trim off a worm stain, or they will trim off a piece of peeling.

Q. Imperfections or spots or things of that sort?

A. That's right.

Q. Well, will they trim out parts of cores that don't come out, things of that sort?

(Testimony of Elmo Martini.)

A. Yes, and we give the orders as to how we want apples trimmed; the floor ladies have that information at all times, just what we are making; actually, we don't have to tell them what we are making, but we may trim a little bit heavier sometimes than we do other times, depending on—

Q. You mean you make a deeper cut to take out imperfections at some times than others?

A. No, if we are making top fancies, the apples almost have to be perfect. There is no tolerance.

Q. Now, if you are not making top fancies, what are the other qualities you make?

A. We make a fancy and a standard—or, we refer to it mostly as choice.

Q. All right. Now, your standard is choice?

A. Yes.

Q. The other grade is fancy? [206]

A. Well, let's call it standard. That's the proper word.

Q. What do you call it?

A. I call it choice, but the Government calls it standard.

Q. All right. And what do you call the other qualities or grades you make? A. Fancy.

Q. I see. Do you make an extra fancy or top fancy? A. Yes, yes, we do.

Q. You do? A. Yes, we do.

Q. All right. So you make a top fancy, a fancy or a standard, is that right?

A. Maybe I should explain that a little bit, so everybody becomes acquainted with it.

(Testimony of Elmo Martini.)

Q. Surely.

A. A fancy, the grade fancy now has—the scoring is 86.

Q. What does that mean?

A. That means that the imperfections and so forth are counted and if—and then deducted from the good portions. I am not an expert at grading. I don't actually—don't know how, but nevertheless if your total score is 86 or better it becomes a fancy.

Now, we have some customers, one of them that is quite large that insists that we produce for them 94 and better, you see. [207]

Q. Yes. So it varies with—

A. With whomever you are dealing with. Now, if it is a Government grade, that is the grade, but it will not make the grades of certain customers.

Q. The grades vary according to your customers and your markets, right? A. Yes.

Q. And you pack all sorts of grades, is that right?

A. Yes. Now, at another point, some—a standard just can't be anything.

Q. A standard has to meet certain standards, that is what you are saying?

A. It certainly does, because we have a substandard. I don't know where the cut-off point is, but there is a substandard, and that must be sold, oh, along with dents and so forth.

Q. Now, dents can be sold—can be top quality or— A. That's right.

Q. —or any other quality, but as long as they

(Testimony of Elmo Martini.)

are dented, you can't sell them as a full product, is that right? A. Yes, that's right, or rusted.

Q. A good product, a perfect product. All right. Now, let's get back. The trimmers have these apples and they trim them; they use knives to do that, I take it? A. Yes.

Q. After they trim these apples, each one is individually [208] trimmed, what do they do, they drop it in the flume?

A. Yes, they drop it in the water flume.

Q. Now, where is the water flume with relation to this chart, which says "39 trimmers"?

A. The water flume is just before them.

Q. Between them and the peelers?

A. No, between the trim belt and the peeler. It is one—there are two conveyors, there is one conveyor immediately before them. That is where their trimmings and anything that they trim off the apples drop through these grates and the conveyor takes it down to the exhaust end of this line.

Q. All right. A. And just beyond that.

Q. Yes.

A. There is a water flume where the apples are dropped.

Q. Now, after they are trimmed then they are dropped in this water flume? A. Yes.

Q. Which is between the trimmers and peelers?

A. Yes.

Q. And it is carried to the point here where it is marked "Squirrel Cage"? A. Yes.

Q. What is the squirrel cage?

(Testimony of Elmo Martini.)

A. The squirrel cage is a washing machine. [209]

Q. What does it look like physically?

A. It is a series of rods on a cylindrical barrel, and inside of it there are heads, spray heads that will constantly spray the apples, and there is also a spiral, a stainless steel spiral in there that will bring the apples up to about midway, the sprays hit them at all times, and then they work through the squirrel cage. I would say that it is ten feet long.

Q. And what is the diameter of the thing?

A. Oh,—

Q. Approximately? A. Three feet.

Q. Now, does this revolve, this squirrel cage?

A. Yes.

Q. So the apples keep revolving like you say in a washing machine?

A. Keep revolving and working forward.

Q. I see. And the spray, is it just water or is it salt water? A. Oh, no, that is water.

Q. Just water? A. Yes.

Q. And that is designed to wash out all specks and particles that are hanging to the apples, is that right, clinging to the apples? A. Yes. [210]

Q. All right. Now, after it gets through the squirrel cage it gets to this point, just below that on the chart, called the inspection—

A. Belt.

Q. —belt, right? A. Yes.

Q. And there are inspectors who inspect the apples individually as they come down, right?

A. Yes.

(Testimony of Elmo Martini.)

Q. Then after it goes to the inspection belt—we are talking about slices now, are we not?

A. Yes.

Q. It goes over here to what, on the chart, are slicing units, which is a long table for slicing, right?

A. Yes.

Q. Before it gets there, there is a point where there are some additional trimmers, second trimmers, are there not, right here at this point on the slicing unit, on the chart, I am pointing to the right—in emergencies?

A. In emergencies only.

Q. Now, an emergency is what?

A. An emergency is where fruit will—where it is impossible for these trimmers, and these trimmers that you refer to as inspectors,—

Q. Yes. [211]

A. —cannot continue, complete the job fully; we put more trimmers on, as many as we can up here, to catch more—

Q. Is that in effect when the flow is probably too fast for them to handle? A. No, it is not.

Q. Is it because of the quality of the product?

A. Yes, that is correct.

Q. I see. With my pen, which I hand you, will you mark on this exhibit the place where these extra trimmers are when you use them?

A. It is not a good position, it is a makeshift position, Mr. Karasick.

Q. Yes, I appreciate that.

A. I am not sure of it, but it seems to me

(Testimony of Elmo Martini.)

that this conveyor goes up, and then drops off in this place here for a couple of people right at this point here.

Q. Yes.

Trial Examiner: Now, how are you marking that now?

The Witness: Well, I am marking it with a little zero.

Q. (By Mr. Karasick): These two zeroes, would you put trimmers just above them or alongside of them here? A. Well, extra trimmers.

Q. Extra trimmers. All right. Put that.

A. I don't know how you will ever check this, because we have torn it down. [212]

Q. Maybe I'll just take your word for it, Mr. Martini. A. You will have to.

Q. O.K., fine. Thank you.

Now, then it goes to—the apple, after the second trimmer,—if you do have second trimmers or extra trimmers as you said—goes to the slicing units?

A. Yes.

Q. What are the slicing units, Mr. Martini; machines that slice apples are they? A. Yes.

Q. How many machines? A. Nine.

Q. Nine? A. I think it is nine.

Q. All right. And what happens, they are operated by women, too, are they not? A. Yes.

Q. The women take these apples; how do they take them, one in each hand?

A. They take—yes, they should take one in each hand.

(Testimony of Elmo Martini.)

Q. And then what do they do with them?

A. We prefer them to do it that way. And then each woman has two spindles.

Q. Now, these are—

A. These are spindles that look very much like my finger, only [213] a little bit—they are quite small. They are only, I'd say, about a quarter inch, stainless steel spindle, and her job is to drop the apple with the core hole in it onto the spindle.

Q. Onto the spindle?

A. Onto the spindle. Below it again there are all of those things around apple machines which look like hands, so I will refer to it as a hand. It drops down on this hand, the hand works on an eccentric or a—well, it is an eccentric gear that will pull it back, and it feeds one apple at a time, and it goes back in here; in other words, if there are three or four apples stacked up here, it will just pull out and drop one apple and stop the other ones; and then there is another hand below that that shoves the apple that is on the spindle through a series of knives; we have some that will cut apples into 14 pieces, some that will cut them into 13, some that will cut them into 8, and so on down the line, depending on the size of the apple that is shoved on this machine, and the hand shoves them on through.

Q. Now, when the apple is sliced, what happens to the slices, they fall on a conveyor belt or table?

A. Last year they fell on a belt.

Q. On a belt? A. On a conveyor belt.

(Testimony of Elmo Martini.)

Q. All right. Now, that conveyer belt brought the slices to this inspection table which is on this chart, to the left and [214] just beneath the words "Slicing Units," right?

A. Brought them down to the end through a salt water bath, then it raises them, raises them up here to what we call a shaker screen.

Q. Now, where is the shaker screen?

A. And the shaker screen is just before this point, just before the inspection table.

Q. All right. Now, that is the shaker screen at the point on the chart which is marked "Conveyor," is it not? A. No.

Q. No? All right. A. Beyond there.

Q. Would you take my pen again, please, Mr. Martini, and indicate on the chart where the shaker screen is. A. The shaker screen is right here.

Q. Do you want something solid to write on?

A. No, I am fine here. I like to write on things like this.

Q. There is your shaker.

I see. So that it goes from the salt solution to the shaker? A. Yes.

Q. Which you have marked now——

A. To the——

Q. To the left of the inspection table, it then goes from the shaker, this shaker screen shakes these slices there—anyone [215] standing there as it is shaking? A. No, sir.

Q. It shakes them for what purpose, so little pieces drop out?

(Testimony of Elmo Martini.)

A. Yes, it shakes them to remove chips.

Q. I see. Then it goes on the inspection table and the inspectors again inspect these slices, right?

A. Yes.

Q. Then after that is a final inspection?

A. At this point.

Q. Yes.

A. Well, yes, it is the final inspection. We have at some time or another run into trouble trying to make our grades, we have put two women just beyond the inspection table, but they were not very satisfactory, not enough room to work.

Q. But, where it was necessary, you used that extra inspection?

A. Actually, for all concerned here, there is—that is the inspection or the trim table there.

Q. I see. And then when you are finished with inspection, the apples or the slices go where?

A. Go into a tank.

Q. Now, where is that tank shown on the chart?

A. The tank is shown on my chart here just north of the inspection table. [216]

Q. Now, north would be——

A. This is north here, of the plant.

Q. Would be to the right of this chart?

A. Yes.

Q. As you were looking at it? A. Yes.

Q. With the words “39 trimmers” and peelers at the top of the chart, facing those words, right?

A. Yes.

Q. All right. Is it shown there at all?

(Testimony of Elmo Martini.)

A. The tank?

Q. Yes.

A. Yes, right here, but——

Q. It is a round, it is a circle at the end of the point marked "Inspection Slices," right?

A. Yes.

Q. Now, what is that tank for, the slices are dumped in there? A. Yes.

Q. What is done with them?

A. They are dumped in there and then again—and then again the tank is a stainless steel tank with a false head on it. In other words, it has a perforated screen, let's say, about six or eight inches below the top of the tank. It also has there a gate where the apples can drop into the tank, so they drop in there and we add to it a—actually, this is a trade secret, but [217] I am going to tell you anyway—we add to it salt, rock salt, and when the tank is full we close the trapdoor and fill it with water.

Q. Now, the purpose of this is what, to purify, to blanch, or to what? A. No, that is——

Q. Or is that a trade secret? I don't want to ask you any trade secrets.

A. Yes, it is, but I will tell you anyway.

Q. I promise you I won't give it to the competition.

A. Well, there may be a competitor out in the audience.

Mr. Berke: Just a moment. If it is a trade secret and it affects competition, I——

(Testimony of Elmo Martini.)

Mr. Karasick: I am not going to press it.

Trial Examiner: I suggest we go off the record and see whether it is material. Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Karasick): All right. Now, how long do they remain in the tank, or is that also a trade secret?

A. No, they remain in the tank at this point only for as long as it takes us to move that tank out of there.

Q. I see. Then you take this tank, and where does it go?

A. It goes any place we have to put it. There are eight of these tanks.

Q. Yes, but from—you have got the slices in this tank; [218] what is the next step in the operation?

A. Well, all right, then we should go on, I will have to tell you what happens here, that's all there is to it.

Q. That's what I want you to do.

Mr. Berke: Well, without telling the ingredients.

Mr. Karasick: No, he is going to tell us what the next step in the operation is. We don't want any—

The Witness: The next step in the operation is this—

Q. (By Mr. Karasick): Yes?

A. This tank theoretically should go under a vacuum bell.

(Testimony of Elmo Martini.)

Q. Yes.

A. A vacuum bell is a large, heavy metal bell affair that fits on a plate. We have—What do you call these things that raise them?

Mr. Berke: A hoist?

The Witness: A hoist, that will raise that tank, the bell off of the tank. Then we skid another one of these tanks that have been filled over here under there, drop the vacuum bell on it, put a 15-horsepower vacuum pump on it and pull a vacuum.

Q. (By Mr. Karasick): I see.

A. Now, that—I don't think I should have to tell you how much vacuum or how long.

Q. I won't ask you. All right. Now, after that, what do you do, what is the next step?

A. The next step is that we remove—again, when that tank [219] has been properly vacuumed, it should be removed from there and raised to the blanching tank, possibly ten feet above the floor.

Q. All right. Now, the vacuum bell you have talked about, there are two circles in about the approximate bottom center of the diagram marked "VB," those are the vacuum bells, is that right?

A. Yes, "VB."

Q. The tank is then removed, you say, from that point of "VB" to the rectangle marked "Blanch"?

A. Yes.

Q. On the diagram, right? What is done there?

A. We take this tank—it sits up on a cradle in its erect position, and there again we have a hoist that will lift it over and turn it on its side and

(Testimony of Elmo Martini.)

dump the sliced apples into a large blanching tank.

Q. Now, that is a tank which has a blanching solution?

A. No, it is a tank which has water in it.

Q. Water?

A. Boiling water. We run this at possibly 212 all the time.

Q. I see. Then after the apples are blanched, what is done with them?

A. Then from that point they are blanched, and there is a stainless steel chain that takes them—or, a stainless steel conveyor belt that takes them on through there to the end here where they hit—that is at the right of this diagram, there is [220] a cross belt that takes those apples into the filling machines.

Q. And that is marked “Filling”?

A. Filler.

Q. To the right and below “Blanch” on the diagram, right? A. Yes.

Q. All right. They are filled into cans, the apples, the slices are put into cans?

A. Either No. 10's or—if this happens to be our No. 2 line—No. 10 line is over on this other side.

Q. Then what?

A. Then they go from this point, they get onto another conveyor and they go through a final cook. It is a long, 90-foot cooker, open trough; still there we have water at 212 degrees. The cans are timed from one end to the other in perfect timing; different apples will take different times of cook.

(Testimony of Elmo Martini.)

Q. May I ask you one thing at this point: The apples are in the cans, now sliced——

A. Sealed in the can.

Q. It is sealed? All right. A. Yes.

Q. I see. And it goes through this cooking process? A. Yes.

Q. And that is where the cooking tank is marked to the right of the diagram, and going at right angles across it? A. Yes. [221]

Q. All right. Then what happens?

A. Then they hit another conveyor at the other end and come back through, come back toward us on a cooling—into the cooling tank.

Q. And that parallels the cooking tank on this diagram? A. Yes, yes.

Q. Then what happens to it?

A. Then from there they come up to the south end of this—that would be the west end of the plant, and they hit a conveyor that brings them to the cannery warehouse.

Q. Where they are labeled and put in the cases, is that right?

A. Yes, they can either go to one warehouse or the other, it doesn't make any difference. We can run either direction.

Q. All right.

A. With a few adjustments, of course.

Q. Yes. Now—Thank you, Mr. Martini. Let's get now to sauce. That takes care of the slices, does it not?

(Testimony of Elmo Martini.)

A. Yes. Now, I'd like to explain a little bit more about this.

Q. Surely.

A. Now, we have gone through here theoretically with one tank, what one tank will do. We have eight such tanks, plus the two vacuum bells, and all of the time that this plant is running on slices there are so-called bells that clutter this entire area.

Q. Yes; now, I didn't ask you about this.

A. No, you didn't, but I want to point it out.

Q. You will have ample opportunity. Let's go to sauce.

Mr. Berke: Just a moment. I think that is part of the process.

Mr. Karasick: That is not part of the process.

The Witness: Yes, it is.

Trial Examiner: Don't argue. You can bring it out later in your examination.

Q. (By Mr. Karasick): Now, let's go to sauce, Mr. Martini. A. O.K.

Q. The apples are dumped in the flume of water again, are they not—let's start at the upper left corner of the chart or diagram. A. Yes.

Q. They go through the peeling operation?

A. Yes.

Q. Same trimming operation?

A. Yes.

Q. Same squirrel cage? A. Yes.

Q. The first inspection belt or table?

A. Let's see where we are. Yes.

Q. Now, then after they have gotten to the in-

(Testimony of Elmo Martini.)

spection belt or table, instead of going to the slicing unit, they go over to where? [223]

A. They go over to an inspection.

Q. Another inspection table, immediately following that? A. Yes.

Q. Over a conveyor belt system, right?

A. Yes, right.

Q. Now, at this point are they whole apples, except for the core and the peelings taken off?

A. Yes. Let me see. Wait a minute. At this point they are whole apples, at this point they are not.

Mr. Berke: Would you please indicate what "at this point" is?

Mr. Karasick: Yes.

Trial Examiner: Where is that?

Q. (By Mr. Karasick): At the point of the first inspection table, and the second inspection, which is marked "Inspection Sauce" on the chart?

A. There at that point they have already gone——

Q. Pardon me. Wait a minute. Would you hold it a minute. A. Oh.

Q. Now, they are at the second inspection belt and they are individually inspected, are they not?

A. That's correct.

Q. Then what happens to the apples?

A. Individually inspected and trimmed.

Q. And trimmed? [224] A. Yes.

Q. So that any further imperfection is taken off, is that right?

(Testimony of Elmo Martini.)

A. That's correct. I only need one inspector, I don't need eight, you see, if I could change that a little bit. I don't know how these things have ever been called inspection belts. They are trim belts. It should be a final inspection and trim, that is what it is.

Q. All right. So, after the squirrel cage, instead of what is here marked "Inspection Belt," you would call that a trim belt, is that right?

A. Yes, it is a final trim belt.

Q. All right. Then it goes over a conveyor to the place where it is marked "Inspection Sauce" on the chart, right? A. Yes.

Q. There the apple is inspected again?

A. Yes.

Q. Then what happens to it?

A. Then it goes into the cooker.

Q. Now, where is the cooker on the chart, is it shown here?

A. Let's see, inspection belt—I'm just trying to think where that cooker is.

Q. Is there a screener that is——

A. That is a pulper?

Q. A pulper? [225] A. Yes.

Q. What happens to the apple physically after it reaches this inspection sauce place, the second inspection?

A. It goes through what we call a—What do they call those things now? It's a chopper, anyway.

Q. It chops it up in little pieces?

A. Chops them, yes.

(Testimony of Elmo Martini.)

Q. Yes, all right. It is a machine?

A. Yes.

Q. I see. And that is located where in relation to inspection sauce here?

A. Just prior to it.

Q. Just before the sauce?

A. Yes, it is—actually, at this point, and this bell goes running that way.

Trial Examiner: “This” pointing——

The Witness: This pointing to the lower portion.

Q. (By Mr. Karasick): Let me ask you a question about it, it will be easier. A. All right.

Q. The chopping machine is located under the point on the chart marked “Inspection Belt” and the point marked “Inspection Sauce,” is it not?

A. That’s right.

Q. All right. It is chopped up, it comes to “Inspection [226] Sauce” and is inspected there, right?

A. Yes.

Q. Then what happens to these chopped up pieces?

A. They flow on through the belt, over the belt.

Q. Yes.

A. To the top—to the other end of the conveyor.

Q. Yes.

A. Thence around through the cooker.

Q. Now, as they go through that process, is there a screener, before they get to the cooker?

A. No.

Q. There is no screener? A. There is not.

(Testimony of Elmo Martini.)

Q. I see. There was not in 1954?

A. No, sir.

Q. The apples then, or these pieces, are then cooked? A. Yes.

Q. Is it shown in—it is not the same cooking tank as used for—— A. No, sir.

Q. ——for slices, is it? A. No.

Q. It is another tank? A. That's right.

Q. And where is that located in relation to the cooking tank [227] on the diagram for slices?

A. It is located—it was located parallel to the inspection belt up there.

Q. The "Inspection Sauce"? A. Yes.

Q. Marked on the diagram? A. Yes.

Q. I see. And to the right of it, would it be, on the diagram? A. To the right of it.

Q. Where there is a rectangle that is unmarked on the diagram? A. Yes.

Q. That would be the cooking table?

A. Yes.

Trial Examiner: Mr. Karasick, when you say "to the right"——

Mr. Karasick: Well, I have already indicated how he has held the chart, Mr. Examiner. You see, if you hold the chart so that the words "39 Trimmers" appear in the upper left corner, then all this becomes clear.

Trial Examiner: Fine.

Mr. Karasick: Thank you.

Q. (By Mr. Karasick): Now, there are speck-

(Testimony of Elmo Martini.)

ers that are used in the applesauce process, are there not?

A. Some of us use them, some do not. [228]

Q. Well, you used speckers during 1954, did you not? A. Yes, we did.

Q. Now, where do you use them, before or after the sauce is cooked?

A. After the sauce is cooked.

Q. All right. Now, after the sauce in the cooking tank is cooked? A. Yes.

Q. Then where does it go, does it flow out in a stream of some sort?

A. No, it flows out into what we call a pulper.

Q. Now, where is the pulper located?

A. The pulper is directly beyond the cooker, attached to the cooker. It is attached, it is a part of the cooker.

Q. It is a part of the cooker?

A. Yes, it is.

Q. And what does the pulper do?

A. The pulper is a machine that will take the cooked apples—and when they come out of there they are still in their sliced form, most of them do not break up like a homemade applesauce, you have seen that.

Q. Yes.

A. It will stay real chunky and large. This pulper—we have different sized holes in it of different porosity; we will say if we want a granular, real heavy granular sauce, we will [229] use larger holes in the pulping screen, which is a cylindrical

(Testimony of Elmo Martini.)

screen with two paddles, or there are four paddles run at an angle inside there that keep turning. In fact, it takes 20-horsepower in order to turn it, and it keeps feeding the sauce, feeds the sauce through the screen, and then out from there, flowing onto the specking table.

Q. Now, you say there are different sized screens? A. Yes.

Q. What diameters are they, do they vary from, and from how coarse to how fine?

A. Oh, possibly—I don't know. We must have any size that you want.

Q. Well, what size did you use there?

A. Do I use?

Q. Yes. A. I believe I use a—use——

Q. Use one or more than one size screen?

A. No, we just have the one.

Q. I see. What is the diameter?

A. I am not sure of the diameter of the holes.

Q. It is a fairly fine mesh?

A. No, it is not.

Q. It is not?

A. No. We are not—You get commercial applesauce that comes in this semi-liquid or semi-solid form and it is not a fine [230] mesh, no.

Q. Would there be lumps?

A. Well, it has—it is a very granular sauce that we produce there. I would say that there are—that it's been probably—from our holes in the screen, it will go to the large size.

Q. For apple screens, that is? A. Yes.

(Testimony of Elmo Martini.)

Q. But you don't know what the diameter is?

A. No, I do not, sir.

Q. All right. Now, after the sauce is pulped and goes through this pulper, where does it go?

A. It goes through the pulper onto the speck table.

Q. Now, the speck table consists of a table in which the sauce flows, or a belt flows, right?

A. Well, it is a stainless steel trough, is what it is.

Q. Trough? All right. And there are speckers located there, right? A. Yes.

Q. And what do they do?

A. They have with them a little tube—

Q. Pneumatic hose?

A. Yes, and we use what we—actually what we use there is a milking machine, just like a dairy would use, and it forms a vacuum and takes and pulls, thus creating a vacuum at the end of [231] the little tube they have in their hand, and should they see a dark spot or a seed cell or something like that, they will try to pick it up.

Q. So the speckers are really another inspection process to pick up anything that has come through in the sauce, right?

A. Yes. Do you want my personal opinion on it?

Q. No, I am asking you the process.

A. Oh.

Q. Now then, the sauce; after the specking process, Mr. Martini, what happens to the sauce?

(Testimony of Elmo Martini.)

A. After the specking table it flows into a tank, a holding tank, possibly 300 gallons.

Q. Then what is done with it there?

A. Then from the holding tank it goes through——

Q. Now, where is that holding tank? Is it shown on the diagram?

A. No, it isn't shown here. The holding tank I would say——

Q. Let me hold this for you.

A. Sure you can. I will put it on there.

Q. Would you, please. Do you have room?

A. There is your specker, right here.

Q. Would you mark that "Specker."

A. And then——

Q. Let's see, the holding tank was——

A. Right here, holding tank. [232]

Q. You have marked that "HT"? A. Yes.

Q. It is a circle just below the square which is the specker, the square or the circle?

A. No, the specker is the square one.

Q. The specker is the square just below the place marked "Blanch" on the diagram and just below that is a circle to the left of which you put the initials "HT"? A. Yes, sir. Yes.

Q. Meaning holding tank, right? A. Yes.

Q. Fine. Now, after the holding tank, the sauce isn't in cans yet, is it? A. No, it is not.

Q. Then what is done with it?

A. After the holding tank, it is taken by a pump and it goes through a heat exchange, in case of a

(Testimony of Elmo Martini.)

temperature drop, a fully automatic exchanger, that will raise the temperature up to the desired temperature, the temperature that we want our fill at. It is called fill temperature.

Q. I see. This is a technical canning process then, part of the process, right? A. Yes.

Q. All right. Then what happens to it?

A. Then, after—of course, after flowing through the heat exchanger— [233]

Q. Now, where is the heat exchanger? You have made a small—would you put “HE” after that and put an arrow to it, a small circle just below where you have already marked “HT” for holding tank, right? A. Yes.

Q. And that is the heat exchanger?

A. Yes.

Q. All right. Then where does it go from the heat exchanger?

A. From the heat exchanger it goes to the filling machine.

Q. Is that marked?

A. Well, there is your closing machine, and your filling machine is just before it.

Q. I see. So that it is filled in a machine just before the part marked “Closing” at three places at the bottom of this chart, right?

A. There either should be a place before them, or they should be moved down.

Q. All right. Well, let's not bother to try to get those on the chart because we can't, but the record shows that.

(Testimony of Elmo Martini.)

Then after they are filled, they are put on machines which close the cans, the cans are then conveyed, I suppose, to the warehouse?

A. Then the cans are conveyed to the—then they move over a conveyor to the closing machines and the lids are put on, and sealed. [234]

Q. And then the same process?

A. And then from there they go out—not through a hot water bath, no. These go through a cooler, these are all ready to—this is edible at this time. It is fully cooked and—

Q. I see.

A. The fill temperature we hope is correct, and now you are cooling them down immediately.

Q. I see. And is the cooling tank the same one that you use for the slice operation, or is it a different one?

A. No, last year it was the same one.

Q. Same one? A. Yes.

Q. And after they are cooled, is that the end of the process, excepting for labeling?

A. And then after they are cooled, we either stack them bright—By stacking them bright I mean filling up a pallet full of cans, or we will put them in bright, in cases, and stack them in anticipation of future orders, maybe under somebody else's label, or we will label them under our own label. You see, we can do various things.

Q. Now, as you were set up in 1954, your operation was so designed that you would either can sauce or can slices, is that right?

(Testimony of Elmo Martini.)

A. That's right.

Q. You didn't carry on both operations simultaneously? [235]

A. No. [236]

* * * * *

Mr. Karasick: Mr. Examiner, at my request Mr. Berke has been good enough to check the Respondent's record with respect to some of the requests made this morning and has informed me as to the case weight of various products which I would like to read into the record as a stipulation between Counsel for the General Counsel and Counsel for the Respondent, as follows: The case weight of slices in No. 2 cans is 38 pounds; No. 10 cans, 47 pounds.

Trial Examiner: What is the 10 pounds, was it—

Mr. Karasick: No. 2, 38 pounds; No. 10, 47 pounds. Sauce in No. 303 can, 31½ pounds; in 8-ounce, 16 pounds; in No. 10 cans, 46 pounds.

The figures previously given with respect to the amount of product canned by the co-op, namely, 80,587 cases, of which 65,322 were 303, and the balance of 15,265 were 8-ounce—Did you get it?

Trial Examiner: I missed it on account of traffic noise. Maybe the Reporter will read it to me, starting with 80 thousand something.

(Statement read.)

Mr. Karasick: As being the number of cases canned for the Respondent by the co-op cannery during 1954, are correct figures [239] in each instance.

(Testimony of Elmo Martini.)

Mr. Berke: So stipulate.

* * * * *

Mr. Karasick: It is my understanding that the co-op, the full name of the co-op is Sebastopol Co-operative Cannery.

Mr. Berke: That's correct.

* * * * *

Mr. Karasick: Thank you. Now, it is further stipulated and agreed that the following employees, who had never worked [240] for the Respondent before, were hired on the dates noted in each instance hereafter, during the 1954 season: Alice Bollinger, October 27th; Sadie Elliott, November 6th; Imogene B. Geasland, October 23rd; Marguerite Hayes, October 20th; Gladys Henningsen, October 27th; Molly Hoffman, October 23rd; Pearl Humes, October 30; Edna Jobe, October 22; Hilda Littleton, October 25; Norma Morian, October 25,——

Mr. Berke: Hold it.

Mr. Karasick: Hold that. Strike the name Norma Morian.

Muriel Nord, October 25; Martha Peters, October 20; Katherine Poncelot, October 22nd, and Lester Stanley, October 29th.

Is that a correct statement and will you so stipulate?

Mr. Berke: I will stipulate to it with one addition, Mr. Karasick, that Imogene B. Geasland, who was hired on October 23rd, had worked two days and that was the extent of her employment.

(Testimony of Elmo Martini.)

Mr. Karasick: If you so represent to me——

Mr. Berke: Yes.

Mr. Karasick: ——I will so stipulate.

Mr. Berke: That's taken from the company records.

Mr. Karasick: I will stipulate on the basis of that representation. [241]

* * * * *

Q. (By Mr. Karasick): Mr. Martini, do you remember a meeting of the growers which took place on or about the 28th of June of this year?

A. Yes, sir.

Q. And you at that meeting made certain statements as to the number of tons of apples, number of cases that come from number of tons of apples, namely,—Does this recall it to your mind?—you said that 700 tons of apples would produce 40,000 cases of finished product.

A. I said that 700 tons of apples could approximately produce that.

Q. That's all that I am asking, I am not asking for exact [242] figures, but this is a rough average of what that would produce, right? A. Yes.

Q. That would be approximately 57 cases per ton, translated into per ton figures, right?

A. Yes.

* * * * *

Cross Examination

Q. (By Mr. Berke): Mr. Martini, you will recall yesterday Roy Rhodes testified concerning a conversation between himself, Angelo Bertolucci

(Testimony of Elmo Martini.)

and you, that was said to have taken place on July 28th, 1954, at the office of Sebastopol Apple Growers [243] Union; do you recall that? A. Yes, sir.

Q. Will you relate for us—Well, strike that.

During the course of this conversation, is it correct that just the three of you were present?

A. In my office, yes.

Q. Yes. And it was in your own private office out at the plant, or where was it?

A. In my own private office.

Q. And had you expected Mr. Rhodes and Mr. Bertolucci that day?

A. No, I wasn't expecting them.

Q. Do you know about what time of the day it was that they came in?

A. No, I don't recall the time.

Q. It was sometime during the morning?

A. It seems to me that it was, yes.

Q. Yes. And who opened the conversation?

A. When I first saw them?

Q. Yes.

A. I possibly did when I—I think Mr. Rhodes was correct in what he stated.

Q. What did you say?

A. Exactly what he—

Q. Well, use that language he said you used?

A. I said, "What the hell are you doing here, Roy and Ange?" because I do know them quite well.

Q. Now, did you say that with disgust or did you have a big smile on your face when you said that?

(Testimony of Elmo Martini.)

Mr. Karasick: Just a moment, just a moment. The witness' subjective reactions I think are not important, and I may say for Mr. Berke's purposes we are making no contention about the so-called bad language used by Mr. Martini.

Mr. Berke: Well, I understood it was background to show anti-union animus.

Trial Examiner: Are you contending now—

Mr. Berke: If you are not contending that isn't background for that—

Mr. Karasick: I am contending the whole incident is background for showing anti-union animus, of course.

Trial Examiner: Well, I will permit the question then.

Q. (By Mr. Berke): Do you remember the question? A. No.

Mr. Karasick: I object to the question again then on the further ground, before he leads the witness into—

Mr. Berke: This is cross examination.

Mr. Karasick: Just a moment. It is cross examination by Respondent's Counsel.

Trial Examiner: Mr. Berke, you have had enough experience with our proceedings to know that when Counsel who is representing [245] the party or one of the supervisors—that leading questions should be avoided if you want to have any weight attached to the testimony.

Mr. Berke: Well, he was called, sir, under Rule 43(b), and I'd like to read the rule.

(Testimony of Elmo Martini.)

Trial Examiner: That's all right. I know what it is. I am just telling you what weight I give to testimony on leading questions.

Mr. Berke: Well, I understand that, but I just want to be clear that I have a right to cross examine.

Q. (By Mr. Berke): When you said that to Mr. Bertolucci, will you tell us whether you said that with a smile or not.

Mr. Karasick: Object to the question.

Trial Examiner: I will permit it.

A. Yes, I said it smilingly, as I know the both of them very, very well.

Q. (By Mr. Berke): I understood you to say that you have known both Mr. Rhodes and Mr. Bertolucci quite well. How long have you known them?

A. Oh, Mr. Rhodes was Business Agent at one of my former plants; at the same time Mr. Bertolucci was the President of the Teamsters. In fact, the plant was right here in Santa Rosa, quite a large winery, so I have known them since, oh, I'd say '46 or '7, somewhere along in there.

Q. Do I understand then that you dealt with both of these gentlemen on Union matters in past years? [246] A. Yes.

Mr. Karasick: I object. All right, let it go, but I will point out that these are leading and suggestive questions on a point which Counsel apparently feels is critical enough to go into.

Trial Examiner: Proceed.

Q. (By Mr. Berke): And what more was said

(Testimony of Elmo Martini.)

in that conversation that morning, on July the 28th, will you tell us and identify who was speaking?

A. In my private office?

Q. Yes.

A. Well, as I recall the conversation, Mr. Rhodes mentioned to me that he had some Union members in my plant and that he wanted to go into the plant and sign up the rest of them, and then sign a contract with them. Of course I refused admission to the plant on my time. I told him that he could do whatever he wanted outside of the premises, but not to go in and sign my people up in the plant where they were working. Then he—we generally discussed the topic, and he told me at that time that he didn't want any more money than what we were paying our people. He said all he wanted was a contract, and he wanted some Union dues from my employees. I smiled to that, and then we went on——

Mr. Karasick: Pardon me, what was the remark?

(Partial answer read.) [247]

A. (Continuing): ——and we went on and I believe Mr. Rhodes offered to buy me a coke or a drink of some kind up at the corner grocer's.

Q. (By Mr. Berke): Who suggested your going to get the coke at the corner grocery store?

A. I am sure that Mr. Rhodes did.

Q. And did the three of you then go out?

A. Yes.

(Testimony of Elmo Martini.)

Q. And how far away was this corner store that you went to with relation to the plant?

A. Oh, a hundred yards.

Q. And——

A. Possibly a hundred and fifty.

Q. And did you walk or drive over there?

A. No, we drove over there.

Q. The three of you together? A. Yes.

Q. And did you have any conversation as you drove over?

A. No, just social conversation.

Q. You didn't discuss anything about the Union, I take it? A. No.

Q. When you got into the store, did you have your cokes? A. Yes.

Q. And was there any conversation there?

A. Social again, because there was several other people in [248] the store and thereabouts.

Q. And did the three of you then return to the plant after you had your cokes, or what happened?

A. No, no, I had my coke and went back to my office.

Q. Now, there's been some reference made here about a raise; did you get a phone call from Mr. Rhodes sometime after that visit? A. Yes.

Q. And what was the conversation—Strike that. First, do you remember how long after the visit it was that he called you? A. No, I do not.

Q. Was it a number of days or a week, can you give us an approximation?

(Testimony of Elmo Martini.)

A. Oh, it seems to me like it might have been a week or two.

Q. And can you tell us what was said in that conversation?

A. I can remember one part of the conversation. He asked me again if I thought the proposition he made to me over, and he—let's see, he asked me—I'm sure that he asked me if I had given my people a raise, to which I answered yes, and that's about the extent of the conversation as I remember. [249]

* * * * *

Q. Now, do you recall whether, when you put this increase into effect, it was before or after Mr. Rhodes was at your office? A. It was before.

Q. Now, Mr. Martini, you were asked yesterday by Mr. Karasick whether you recalled your employees by postcard, and I believe your answer was yes; is that correct?

A. Yes, that's what I said, yes.

Q. Now, will you please state your recruitment practice in 1954, how you recruited your employees?

A. Yes. We open up our office and take applications from workers, then a week or so before we plan to start the plant up we review applicants, look over the applications and pick from [255] those, again choosing those that we want to start with; then when we know definitely the beginning of the first shift, we send cards out to a picked group, shortly before.

Q. Now, was that the practice last year, 1954?

A. Yes, sir.

(Testimony of Elmo Martini.)

Q. About how long before the season begins do you begin taking applications?

A. I would estimate three, four weeks before.

Q. And would you say then after you picked the people that you wanted, you send out postcards to them, is that what I understood you to say?

A. Yes.

Q. All right. Is that the reference you had to the postcard yesterday? A. Yes, sir.

Mr. Karasick: Object.

Q. (By Mr. Berke): Do you send out—

Mr. Karasick: Just a moment. Object, and move to strike the answer.

Trial Examiner: Overruled. It is in now.

Q. (By Mr. Berke): Did you last year send out postcards to employees who had worked in the preceding season, from any lists of such employees?

A. No, sir.

Q. Did you telephone any such employees that worked for [256] previous seasons and ask them to come to work in 1954?

A. Not to my knowledge.

Q. From a list of the preceding season?

A. Not to my knowledge.

Q. Now, with reference to the discharge of Mrs. Diekerson, did I understand you correctly to say that she was discharged for plugging or decorating an apple, or whatever the term is?

A. Yes, sir.

Q. I show you an object, Mr. Martini, and ask you if you can tell us what that is.

(Testimony of Elmo Martini.)

A. I would call it a paring knife.

Q. And who uses a paring knife in your operations?

Trial Examiner: I am just wondering if that isn't a peeler.

Mr. Berke: Well, they call it a paring knife and I think we ought to take their term.

Trial Examiner: Well, for the record, I'd like to have a description of it so it isn't confused with the ordinary straight-blade knife.

The Witness: Why don't you refer to it as an apple paring knife?

Trial Examiner: All right.

Q. (By Mr. Berke): All right. Can you describe it for the record, Mr. Martini?

A. Well, it's a half-round object with a blade at the high [257] point of the bend.

Trial Examiner: That is, the outside curve?

The Witness: The outside curve of it.

Q. (By Mr. Berke): Does it have a wooden handle on it? A. Yes.

Q. Now, the Trial Examiner has made a reference here to peelers; is there a difference between that and the peeler, in your operations?

A. Yes, sir.

Q. Does a peeler look anything like that knife you hold in your hand? A. No.

Q. What is a peeler, if you will describe it again for us, please?

A. Well, a peeler is a power machine that will peel and core apples that have been set on it, on

(Testimony of Elmo Martini.)

the cup that holds the apple and move it from place to place.

Q. Is it power-operated, Mr. Martini?

A. Yes, sir.

Q. And the knife you hold in your hand, that is used manually? A. Yes, sir.

Q. Some individual holds it in her hand and uses it, is that correct?

A. That's right, that's right.

Q. Mr. Martini, this object I hold in my hand, will you for [258] the purpose of the record state what it is?

A. It is a peeled and bruised and cored apple.

Q. What type of an apple is it?

A. I'd say that it is a Gravenstein; in fact, I know that it is a Gravenstein.

Q. Now, what cored and peeled this apple that I hold in my hand?

A. The power machine.

Q. And this is the way it was cored and peeled during your operations last year? A. Yes, sir.

Q. I note that at each end of the core hole there is apparently still some green peel on there?

A. Yes.

Q. When the apple comes off the peeler in that fashion, what is done with it?

A. Then it drops off onto a skid plate that goes to where the girls, the trimmers are standing in position, and they pick up each individual apple and peel off of the apple any portion of skin that

(Testimony of Elmo Martini.)

is on there, any deep bruised tissue, and any other defect that might be there.

Q. Now, in performing that operation, what does the trimmer use? A. Uses this knife.

Trial Examiner: That you have in your hand?

Q. (By Mr. Berke): Yes, that paring knife that you have just testified about? A. Yes.

Q. Now, normally, is that the way the apple comes off the peeler, as you have it there in your hand?

A. Yes, the great majority of them; occasionally there are machines—and a machine will sometimes skip, it will sometimes slip, the forks will slip if the apple happens to be soft, but let us say that as a general run of apples they come off in this manner, very few that do not.

Q. All right. Is it correct that this apple has one core hole in it? A. Yes; yes, sir.

Q. Through what appears to be the center of the apple, is that correct? A. That's correct.

Q. Now, I show you another apple, Mr. Martini, which apparently has two holes in it and something in one of the holes. Will you describe for the record the condition of that apple, please?

A. This apple has—it is peeled and cored by machine. By some mischief, another hole is bored onto the side and a plug, a core, is shoved back into the hole that was bored.

Mr. Karasick: I move to strike the witness' characterization "by some mischief," as being volunteered and not responsive. [260]

(Testimony of Elmo Martini.)

Trial Examiner: Well, I will sustain that objection.

Mr. Karasick: If Mr. Martini testified to his mischief, fine, but otherwise no.

Q. (By Mr. Berke): You brought both those apples in at my request, didn't you, Mr. Martini?

A. Yes, sir.

Q. And one of the holes in this apple that I showed you, you know was made by what?

A. By a machine.

Q. And the other hole was made by what?

A. By this coring knife.

Q. And who did that?

Trial Examiner: When you say "this coring knife," that is the same thing as a peeling knife?

The Witness: I should say by a coring knife of this type.

Q. (By Mr. Berke): Who made that second hole with that knife? A. This one?

Q. Yes. A. This one?

Q. The one on this particular apple, yes.

A. I think Mr. Duckworth made it.

Q. All right. Did he do that at your request?

A. Yes, sir.

Q. All right. Now, I show you another object I hold in my [261] hand and ask you what that is.

A. That is the core of an apple.

Q. And is that the core that comes out after the peeler or power-operated machine makes the core hole? A. Yes.

Q. And tell us whether or not it was—the nature

(Testimony of Elmo Martini.)

of what happened to the apple as that led to Mrs. Dickerson's discharge, that was told to you by your supervisors.

Mr. Karasick: Now, just a moment.

Trial Examiner: No objection?

Mr. Karasick: No.

Q. (By Mr. Berke): Do you understand my question? A. No, I don't, Mr. Berke.

Q. Did your supervisors, or any of your supervisors tell you what Mrs. Dickerson did to the apple? A. Yes.

Q. Who was it that told you?

A. Mr. Duckworth told me.

Q. And what did he tell you was done to it?

A. He told me that a core was being pushed at the opposite axis of the apple or the opposite—in the opposite direction that a core comes out; in other words, a hole was dug in, and he fully explained it, just what was happening. In fact, he showed me one of the apples.

Q. In fact he what? [262]

A. He showed me one of the apples.

Q. And when he showed it to you, was it in the same situation as the apple you hold there in your hand? A. Yes, yes.

Q. Now, tell us whether or not, Mr. Martini, your company in its operations endeavors to get all it can out of each apple?

A. It certainly does.

Q. Does that have an economic bearing on your operations? A. Why, certainly.

(Testimony of Elmo Martini.)

Q. Now, when a second hole is put into an apple, I suppose it is obvious, but I will ask the question anyway, does it result in getting less out of that apple than you otherwise would? A. Yes.

Q. Now, assuming at the time you were slicing apples what effect would a second hole have upon slices? [263]

* * * * *

Q. (By Mr. Berke): Go ahead, Mr. Martini.

A. Well, in the case of slicing this apple you can see that—these knives that slice apples now run down through the apple in this method.

Q. Describe it for the record, what you mean by “this method.”

A. Slice the apple this way.

Trial Examiner: In a vertical fashion?

The Witness: In a vertical fashion, and let's say there are fourteen slices that will cut out of this apple. I would almost say that this apple will make twelve slices. These—there will be possibly six of these slices on either side of this apple, which is 50 percent of the apple; that will not make a No. 1 sliced apple. The slices must be full. We knock all the chips, we take the chips out by either hand-picking or by a shaker screen, and naturally these apples, these smaller slices, either go through the shaker screen if they are small enough, or they will go on over the belt, and they will be [264] picked out by women along the final inspection and thrown into the peeling and core bin.

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): Now, if they go through the shaker screen, what happens to them?

A. If they go through the shaker screen, they are picked up, and they go through into the peeling and core bin.

Q. And what happens there?

A. Then those apples, whatever is in there, is either sold for vinegar stock, that is, we sell them to vinegar manufacturers, they grind them and press them and make vinegar out of it, or we will take them and grind them ourselves and make them—make it into concentrate.

Q. Now, I think you testified under examination by Mr. Karasick to the effect that the core plugged back into the apple has upon the product. Will you tell us just what that is again?

Trial Examiner: Excuse me. I thought you were going to inquire about those slices, both slices and sauce.

Mr. Berke: Yes, I am going to sauce when I finish this; what happens in connection with slices when a core is plugged back into the apple is what I am getting at.

The Witness: Well, a portion that—that core could go beyond the shaker screen onto the final belt, and sometimes when we are running at a fast rate of speed the apples are somewhat deep, up to five and six inches deep, and a core could [265] get by and get into your finished product in the case of slices.

(Testimony of Elmo Martini.)

Q. (By Mr. Berke): If that happened, would it have an economic effect on your operations?

A. Yes.

* * * * *

Q. (By Mr. Berke): Now, Mr. Martini, taking that same apple [266] in that same condition, will you tell us what would happen if you were running sauce, applesauce at the time, let's say you were running fancy applesauce?

Mr. Karasick: Object. Let's say they were running applesauce that they were running in 1954, and until that is established I don't think it is relevant.

Trial Examiner: You accept the suggestion?

Mr. Berke: No, I don't. I will get the effect on both sauce——

Mr. Karasick: I press the objection, Mr. Examiner.

Trial Examiner: In view of the testimony that only one screen is used, I fail to see any basis for objection. I can't see that the product would be any different.

Mr. Karasick: Counsel seems to feel so, Mr. Examiner. I take it that he has a reason for doing so. The only relevant question for determination at this time is what happened at a particular point of time in 1954 when a certain apple was, assertedly, plugged or decorated. Now, unless they can show what was going on and being processed at that time, the rest is irrelevant and immaterial.

Trial Examiner: Unless it is shown that there was a difference in the method of proceeding in

(Testimony of Elmo Martini.)

1954—'3 and '54, I will just have to assume it was the same.

Mr. Karasiick: No, perhaps—maybe I don't make myself clear. I am not sure, this might be semantic. Counsel is now [267] asking whether fancy—what would happen if fancy sauce was packed. You remember Mr. Martini talked about various grades that could be packed. The only question in issue here is what happened at a particular point of time when Mrs. Dickerson assertedly did something to an apple; the sauce that was being packed at that time is determinative of what the problem is, not the sauce that was packed at some other time. Now, unless they are prepared to show that fancy sauce was packed, then this is not a proper question.

Trial Examiner: I think I see what you are driving at.

Mr. Berke: Yes, let me ask General Counsel's representative, does he contend that because perhaps of fortuitous circumstances these particular apples involving Mrs. Dickerson didn't affect the pack on that particular day, that therefore the company engaged in an unfair labor practice in discharging her? I am interested in knowing General Counsel's theory, that we are groping in the dark on here otherwise.

Trial Examiner: Well, I see the basis for the objection, but until it is known exactly what was packed, I will permit Mr. Berke to cover the field.

Mr. Berke: All right, thank you. I will withdraw

(Testimony of Elmo Martini.)

that question and first ask a couple of preliminary questions.

Q. (By Mr. Berke): You testified in 1954 you packed both fancy and what you call standard or choice applesauce, is that correct? [268]

A. That's correct.

Q. Now, what is the difference between fancy and standard applesauce?

A. Our fancy applesauce as a general rule is a—it's a little bit thicker, not quite as—it doesn't run to a liquid type substance. It has less than 5 percent defects of any type, whether it should be a seed cell or a piece of—a piece of seed or a piece of skin. Mind you, there are some, a certain tolerance there that is permissible, but they are quite free of the defects.

Q. And is there a difference in the selling price between the fancy and the standard sauce?

A. Yes.

Q. What is that difference?

A. The difference—

Mr. Karasick: Not what is the difference again, Mr. Examiner—I am sorry to interrupt, but it is what was the difference at the point of time that this is alleged to have occurred.

Q. (By Mr. Berke): Well, what was the difference?

Mr. Karasick: That is the only relevant inquiry here.

Q. (By Mr. Berke): What was the difference in 1954?

(Testimony of Elmo Martini.)

A. The difference in 1954 was approximately 20 cents per case, or I should say 20 cents per dozen. That's 40 cents per case.

Q. Now, if a defect beyond the tolerance that you have [269] mentioned here a moment ago is found in a can, what happens then?

A. That lot carrying that code mark will be downgraded to a standard or a substandard sauce, or slices. We have tried various ways of watching that, as soon as——

Q. How do you watch that?

A. Last year we got a series of colored cans and as soon as the grade dropped on us, we'll assume that I was making a fancy, a top fancy applesauce, we would run into a bad lot of apples that we found or we saw at the finish point could not be humanly cleaned up to make that particular grade, we would insert, let's say, a blue can into the line, and when the blue can came to the labeling line all of the stuff—or the applesauce or slices, whichever they were, that came from that point on until a yellow can, let us say, was coming through, which could have been an hour or two, or it could have been the rest of the day—came through, that particular product that came through in that time would be downgraded to a secondary grade. Now, may I explain a little bit further?

Q. Go ahead.

A. There are other methods of doing it. One of my competitors in Sebastopol says that it is impossible to make a standard or a fancy sauce, that you

(Testimony of Elmo Martini.)

either can make one or the other in a complete day.

Mr. Karasick: Just a moment. What this witness' hearsay [270] testimony is about some competitor and his opinion should be stricken.

Mr. Berke: I will agree that part go out.

Trial Examiner: Strike it.

* * * * *

Q. (By Mr. Berke): Assuming that you were processing sauce, and apples in that condition came through, will you tell us what would happen, as you described what would happen when you were [271] slicing apples?

Trial Examiner: You mean physically?

Mr. Berke: Yes. [272]

* * * * *

The Witness: The apple possibly could get by the final inspection, because it has got its hole, and it will be trimmed, and then it will go through the chopping machine prior to the final inspection belt, that you either have one person, two, or sometimes three, depending on the apples; I assure you that a [273] core in an apple running through that machine will make quite a mess on that table, and if there is any number of cores run through there, full cores, I doubt very much whether the girls that are on that table could ever clean them up. They see them going through, but unfortunately there is no stopping to any of these lines; if we could only stop the flow of applesauce or apples it would be a wonderful thing, but it can't be done. Everything behind that thing is coming along, and if any one

(Testimony of Elmo Martini.)

segment of it stops, you've never seen a mess, Mr. Karasick. You have applesauce and apples all over the place.

Q. (By Mr. Berke): Now, you said if an apple in that condition got through there would be a mess. Now, what do you mean by a mess?

A. The core—actually, these blades in these slicing machines would chop it up, they'd chop it up rather fine. We do that because it is easier to cook, and you'd almost have to be picking up, in a case of a core—you'd have to be picking up almost dust particles. It would grind the core up to almost powder.

Q. Now, tell us whether or not the process that you have described with respect to the cans, the blue label and the yellow label, would be the same if you were processing sauce when that occurred?

A. Yes. [274]

* * * * *

Q. (By Mr. Berke): During the 1954 season, to your knowledge did anyone else plug or decorate an apple in the fashion that you have described here? A. Not to my knowledge.

Q. Now, Mr. Martini, you were also asked by Mr. Karasick about the discharge of Mrs. Storey. Did you at my request check the time record on Mrs. Storey for September the 25th, the day on which she was discharged?

A. Yes, sir. [275]

* * * * *

Q. (By Mr. Berke): Mr. Martini, I show you

(Testimony of Elmo Martini.)

what purports to be a timecard, No. 339, dated September 25th, 1954, name "Storey, Orice," and ask you if you got that card from the company records at my request? A. Yes.

Q. And, having looked at that card, does this refresh your recollection as to the events that led to Mrs. Storey's discharge on September 25th?

A. Yes.

Q. All right, just a minute. Now, do you have a calendar there, Mr.— A. Yes, sir.

Q. —Martini? I am not sure whether the record shows it or not, but there was some hassle here yesterday about September 25th being a Saturday. Does the calendar show that that was a Saturday?

A. It does.

Q. All right. Does the fact it was a Saturday, and having looked at the card at my request, refresh your recollection as to the events that led to her discharge? A. Yes.

Q. All right. Now, will you please state what occurred on the date, at the time of Mrs. Storey's discharge?

A. Well, I was on the balcony again over the— just outside of the lab and superintendent's office, inside the cannery [276] proper, and saw Mrs. Storey down below with a group of people.

Q. Now, let me ask you, how high above the place where you saw Mrs. Storey and the group of people is this balcony?

A. I would judge that to be about nine feet.

Q. And what does that balcony lead into?

(Testimony of Elmo Martini.)

A. Leads into the superintendent's office and into the——

Q. How do you get up to that balcony?

A. By a stairway.

Q. And where do the stairs lead from the balcony? A. Where do they——

Q. Where do they go to, yes?

A. They go right to the cannery floor.

Q. All right. Now go ahead.

A. So I had been in there talking to Mr. Duckworth and asking him what Mrs. Storey was doing down below me there; and he asked Mrs. Hardin, and Mrs. Hardin said——

Q. Wait a minute. Who is Mrs. Hardin, first?

A. Mrs. Hardin was the acting floor lady at the time.

Q. And tell us whether or not she was Mrs. Storey's supervisor that day? A. Yes, she was.

Q. All right, go ahead.

A. And Mrs. Hardin stated to Mr. Duckworth that she was ill. Mr. Duckworth reported back to me and stated that Mrs. Storey had clocked out ill, so at that point I sent Mr. Duckworth down [277] to see if she had clocked out, and he returned and said that she had, and I said—and I told him, well, if she's clocked out, why doesn't she leave the building and go home, if she's sick. So——

Q. Go ahead, what happened then?

A. So he went downstairs and talked to her and came back and told me that she wouldn't leave. So

(Testimony of Elmo Martini.)

I told him at that time to go down and see that she left and never came back.

Q. Now, do you recall whether Mrs. Storey and these women were standing—whether they were standing near any machinery down in the cannery?

A. Yes. There is always machinery.

Q. Now, what sort of machines were they near?

A. They were near the—they were near tanks, and there were some tanks stored there, and, as I recall, there was a fork-lift backing in and out of the cannery proper.

Q. Any other machinery?

A. What's that?

Q. Was there any other machinery nearby?

A. No, just the—the sliced apple tanks and the fork-lift that was doing something in there.

Q. And about how many women did you say were with her?

A. Oh, I would say ten, fifteen.

Q. And after Mr. Duckworth went down a second time, pursuant to your instructions, did you see him talking with her, that [278] is, did you continue watching and did you see him talking to her?

A. No.

Q. Do you know whether she left after he went down a second time?

A. He informed me that she had.

Q. Now, was there an incident involving Mrs. Storey preceding that day? A. Yes.

Q. When did this incident occur, approximately?

(Testimony of Elmo Martini.)

A. I would say that it would be approximately—this was the 25th, I'd say that it was the 22nd or the 23rd of September. A couple of days before that Saturday.

Q. And where did this incident take place?

A. In approximately the same place there, possibly to the right, looking at the diagram, possibly to the right a little bit further.

Q. Now, was this during working hours?

A. The incident?

Q. Yes. A. Yes.

Q. Incidentally, was the occasion which you related on the day of discharge, when you saw Mrs. Storey and the women down there, was that during the working time? A. Yes. [279]

Q. Do you recall independently what time Mrs. Storey clocked out or checked out on September 25th, the day of her discharge?

A. Yes, only by having seen that card, it was at 11:24.

Q. 11:24? A. Yes.

Q. A.m. or p.m? A. A.m.

Q. All right. Now, going back to the incident that occurred two or three days previously, which you say took place at about the same point, what time of the day or what part of the day do you recall that that happened?

A. That was just at the beginning of the lunch break, the beginning of the shift after lunch hour, let's say, or after the lunch half hour.

(Testimony of Elmo Martini.)

Q. You mean when they were supposed to go back to work after the lunch hour?

A. Yes, right at that time. [280]

* * * * *

Q. (By Mr. Berke): Will you tell us what took place then, and if there was any conversation will you identify who spoke? A. What was that?

Q. Tell us what occurred on that occasion, if there was any conversation involved will you identify the persons speaking?

A. Yes. Well, I was having a meeting with Leonard Duckworth at the time, and Mrs. Storey sent for me, sent up for me through Edna Hardin and wanted to talk to me. So I went downstairs and talked to her and the group of about 20 to 25 women around her.

Q. And where was that group standing?

A. They were directly underneath the cradle that holds the vacuum—the stainless steel tanks at the blancher dump.

Q. Now, if those women hadn't been standing there, what should they have been doing at that time?

A. At that time about 50 or 60 percent of the women were already at their posts, waiting for the machinery to start.

Q. Maybe you didn't understand the question. What about these particular women?

A. They were to be at their posts.

Q. That is, they were to be working, were they?

A. They would have been started to work, yes.

(Testimony of Elmo Martini.)

Q. All right. Go ahead and tell us what occurred when you got down there.

A. At that time Mrs. Storey asked me—she wanted me to meet [281] with the Union officials, and I told her that I definitely would not.

Q. Well, did she use any names, if you recall, give us as near as you can recall.

A. Yes, she used Mr. Rhodes' name, and I told her that since the matter was in the hands of the National Labor Relations Board I had nothing to talk to him about and that the Board would render their decision shortly, so be patient with them.

Q. Was anything else said by you or Mrs. Storey or anybody else that was present?

A. No. She told me at that time that if I didn't meet with them that they would walk out, and to that I said that I would advise them to go to work and forget the issue.

Q. Did they go back to work? A. Yes.

Q. Now, you told them, as I understand it, that that was a matter pending before the National Labor Relations Board, is that correct?

A. Yes.

Q. What matter was, if you recall, pending at that time?

A. As I recall, at that time we were awaiting to see—well, there have been so many times, I don't know whether we were waiting to hear of the date of the election or whether we were waiting to find out whether or not an election would be called.

Q. I see. [282] A. I'm not certain.

(Testimony of Elmo Martini.)

Q. In other words, there was a representation matter pending before the Board?

A. That's correct.

Q. Involving your employees at the time?

A. Yes.

Q. And that is what you had reference to?

A. That's correct.

Q. When you mentioned the matter before the National Labor Relations Board? A. Yes.

Q. Now, was there another incident involving Mrs. Storey and yourself? A. Yes.

Q. When did that occur?

A. That occurred that same day.

Q. What part of the day, do you recall?

Trial Examiner: When you say "that same day," you mean on——

The Witness: On the 22nd or 23rd. Yes, I had Mr. Duckworth call her into my office.

Q. (By Mr. Berke): Well, can you tell us about what part of the day it was?

A. Oh, I would say that it was possibly around two o'clock.

Trial Examiner: P.m.? [283]

The Witness: P.m.

Q. (By Mr. Berke): All right.

A. So I had Mr. Duckworth——

Q. Mister?

A. Mister, yes, go get Mrs. Storey for me and told him to be sure that she took someone else off the line to accompany her and to meet me in his office with him present.

Q. Now, where was his office?

(Testimony of Elmo Martini.)

A. His office is just inside the—is an office off of the little balcony, inside the cannery proper.

Q. Off the balcony you referred to previously?

A. Yes, upstairs.

Q. All right. Now, did he go and get Mrs. Storey? A. Yes, he did.

Q. And did somebody else accompany her?

A. Yes.

Q. Who was it, do you recall?

A. Lila Layman, or Lyman.

Q. Do you know how to spell that last name?

Mr. Magor: L-a-y-m-a-n.

The Witness: M-a-n?

Mr. Berke: Well, I will accept that.

The Witness: Yes.

Q. (By Mr. Berke): Was there anyone else present besides yourself, Mrs. Storey and Mrs. Layman? [284] A. Mr. Duckworth.

Q. The four of you? A. Yes.

Q. And this was in whose office?

A. In Mr. Duckworth's office.

Q. All right. And what took place in there, will you tell us, please?

A. Well, I told Mrs. Storey that inside the plant I did not want another occurrence, such occurrence as had just happened that day a little bit sooner, or a little bit earlier in the day.

Q. And what occurrence were you referring to?

A. I was referring to that group of women she had there, when she called me down and told me they were going to walk out if I didn't meet with the Union officials.

(Testimony of Elmo Martini.)

Q. All right, go ahead.

A. Then I continued, and I told her that actually I admired her fight and also this Lila Layman, I told her the same thing, that I admired the way they looked at things and the way they fought for what they thought was right, but that if they wouldn't do me a favor and cease from having any conversations whatsoever of that type in the building proper where it would disrupt my employees and affect the production of the plant. Then I went on and told her that I would not prohibit her from even using one of our boxes if she wanted to make a speech to [285] the other women there, provided that it was outside the building proper, didn't necessarily have to be off the grounds, but she could do whatever she wanted out there and it was her privilege. I did not ever tell her to stop talking about anything she wanted to.

Q. All right, I just wanted the conversation. Was there anything more to the conversation, did she say anything?

A. Oh, no, I don't recall what the — there was some conversation, I don't recall what it was. I think that they asked me why I didn't go ahead and let them sign up with the Union, and I told them at that, that their opportunity would come and they would decide it themselves.

Q. I didn't understand, you say why you didn't go ahead and sign up with the Union, or why they didn't go?

A. No, why I didn't go and sign up with the Union.

* * * * *

(Testimony of Elmo Martini.)

Q. As I understand it, you then, either that day or the next day, informed Mr. Storey — or, strike that.

Going back now to September the 25th, the day of Mrs. Storey's discharge, is it my understanding that you informed her husband of the discharge?

A. Yes.

Q. Was it the same day or the next day, do you know? A. It was the same day. [286]

Q. About how long after?

A. Oh, twenty minutes, half hour afterwards.

Q. Was there an incident involving Mr. Storey that day? Yes or no?

A. There was an incident involving Mr. Storey, but I don't remember whether it was that day or a day or so previous to that,—

Q. I see. A. —Mr. Berke.

Q. Where did this incident occur?

A. In Mr. Duckworth's office.

Q. And who was present? A. Mr. Storey.

Q. And who else?

A. Mr. Duckworth was there with him.

Q. And you? A. And me.

Q. Just the three of you? A. Yes.

Q. What took place then? Can you identify who was speaking?

A. I informed Mr. Storey that I had had reports that he was leaving his post and going into other departments during a short breakdown period, short breakdown periods, or possibly at times when there were too many apples having been dumped

(Testimony of Elmo Martini.)

into the flumes, and I told him that I didn't want that ever to [287] happen again, I wanted him to stay at his post and be sure that he stayed there at all times.

Q. Now, you say you told Mr. Storey that you'd been informed about this? A. Yes.

Q. Who had informed you?

A. Mr. Duckworth informed me.

Q. Had you been informed about that just once or more than once?

A. Oh, I had been informed on that a couple—about twice before. [288]

* * * * *

Q. All right. Now, Mr. Martini, in testifying this forenoon about the mechanics of the operation in relation to the [295] freehand chart that is in evidence as General Counsel's 23, among the things I understood you to say was that when you are slicing apples you put them into a tank in which rock salt is added and close the trap door and fill it with water, then the tank is taken out; did I understand that correctly?

A. Yes, the tank is removed from that—from where it was being filled.

Q. All right. Now, how is that tank removed?

A. With a fork-lift truck.

Q. Now, can you describe the work-lift, the type of fork-lift truck that takes that tank out, or did last year?

A. We—I think the best way to explain it, we use all Clark, they are Clark 5,000 pound trucks.

(Testimony of Elmo Martini.)

Q. Are these operated by a motor?

A. By a gasoline motor, yes.

Q. Gasoline motor. And do you have a man that actually sits on it and operates it? A. Yes, sir.

Q. And how does the fork-lift operate when it takes these tanks out, just tell us where it comes into and what it does.

A. Actually, the fork-lift stays inside the plant there most of the time, other than times when he has to grease it and gas it and so forth. It will go over where the tanks are being filled. We all know what a fork-lift is. That is two forks, they will fit directly underneath the tank filled with apples [296] and water, and he will move that to another position, and immediately put an empty tank there, because the hopper doesn't hold very many apples, and it will soon run over if you don't add an empty tank to it. That is his first step. That takes quite a little bit of maneuvering to have gotten that tank out of there, set it down, pick up an empty tank and put it back under in the hopper. Then from that——

Mr. Karasick: Just a moment, Mr. Martini. I move at this time to strike the witness' characterization and conclusion that that takes quite a bit of maneuvering. I think he is entitled to testify as to the operation. He is not entitled to insert his interpretations of these operations.

Mr. Berke: Certainly he is competent to tell——

Trial Examiner: I know, I will say though that as far as I am concerned "quite a bit of maneuver-

(Testimony of Elmo Martini.)

ing” doesn’t give me any description at all. It means nothing.

Mr. Berke: All right.

Q. (By Mr. Berke): Will you tell the Trial Examiner what you mean by maneuvering in the operations?

A. Well, he has to—the fork-lift picks up the tank. He has to back away from that point and usually drives straight ahead to another point in the plant. Then he goes to pick—then he backs out of there or goes forward, depending upon where the empty one is, and picks up an empty one immediately and puts it back where he took the full one out. Then he puts [297] —after he has left the empty one, his next move is possibly to take an empty one off of the top of the blanching—off of the top of the blanching.

Q. What does he have to do to that?

A. Well, all depends on just what position he is in. He usually has to—the blanching tank is, we’ll say, sitting in this direction, or let’s say that it is sitting this way and——

Q. Now, wait a minute. Slow up a bit.

A. Let’s say——

Q. Just a moment. Slow up a bit. You indicate with your hands that the tank might be sitting straight forward in front of the fork-lift, is that what you mean by putting your hand out the way you did, or at an angle?

A. No, I was referring to—I was referring to the

(Testimony of Elmo Martini.)

fork-lift having to pick the tank off the top of the blanching.

Q. All right.

A. Tank, which is up there about, oh, six, eight, maybe nine feet. I don't know the exact height of it. Now, if he is—if he has just set an empty tank under the hopper where the slices feed into it—he must then back out and drive to the right, back again, and get himself directly straight into that thing, where he will have to back two or three times before he can pick up the tank off of the top.

Q. In other words, he has got to be directly under it, is that what you are saying? [298]

A. He has to be directly straight into it so his forks will fit under it, you see.

Q. All right.

A. You can't pick it up from all directions. Then, after he does that, he lets the empty tank down and must find a place for the empty tank, wherever that one is—it is hard to tell, it could be on either one side of the doorway or the other, and he goes and picks up a tank that is draining water out—will drain the water, the salt, right out of these tanks, so he picks that one up and puts it up on top of the blanching tank; again he has to back in and out of the place and get the tank up on top of the blanching, the blancher tank.

Q. Now, where do all these motions and man-
euvers take place? A. They take place—

Mr. Karasick: Just a moment. I object to the

(Testimony of Elmo Martini.)

characterization in the question that the motions are maneuvers. It's a fork-life operation; where does it occur is one thing, but to characterize it in a question is another.

Q. (By Mr. Berke): Well, what would you call a thing that is going back and forth and back and forth, standing still,—

Mr. Karasick: I object to the question.

Trial Examiner: Go ahead.

The Witness: It's taking place in an area which I would guess is 12 by—not over 12 by 15 or 18 feet total. Now, there are some— [299]

Q. (By Mr. Berke): And what is this area you are talking about?

A. It's between the blanching tank and filling—I will have to get the map for you again—and the hopper where the sliced apples are put into the tanks, where they are being filled.

Q. Now, is that inside or outside the cannery?

A. That is inside.

Q. Now, will you tell us, Mr. Martini, whether such movement took place last year in the area where Mrs. Storey and this group of women were?

A. Yes, it was at all times, they'd be—the fork-lifts and tanks were there all the time. [300]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Karasick): Did I understand your testimony to be that employees who worked for the company in prior years and had not made any formal application for the succeeding season were not

(Testimony of Elmo Martini.)

notified by postcard if they wanted to return to work at the new season?

A. We only notify those that have a signed employment application.

Trial Examiner: For the current year?

The Witness: Yes. [308]

* * * * *

Trial Examiner: Did you know before Mrs. Dickerson was discharged that she was going to be discharged?

The Witness: No. [328]

Trial Examiner: When did you first learn about her discharge?

The Witness: Well, I wouldn't know that. It was within—could have been that day, and it might have been the day after or a couple of days after that, all depending where I—I could have been out of town.

Trial Examiner: When were you told about the plugged apples, before or after you were notified of Mrs. Dickerson's discharge?

The Witness: No, I was told about the plugged apples after, I was told at the same time but it was——

Mr. Karasick: I'm sorry, I don't hear.

Trial Examiner: Read the answer. Let him hear the answer.

Mr. Karasick: May I have the question, too? I didn't get any of it.

Trial Examiner: Read the question.

(Question and answer read.)

(Testimony of Elmo Martini.)

Trial Examiner: Did you want to finish it?

The Witness: Yes, let me see. My trend of thought was—I was made curious at the time, and that's when I saw the plugged apple, because I had somebody show me an apple there that was found.

Trial Examiner: Have you any recollection now, knowing the date of Mrs. Dickerson's discharge, as to how long after [329] that discharge you were first told about it and the plugged apple?

The Witness: I would say that it was the next day. [330]

* * * * *

Recross Examination

Q. (By Mr. Berke): Was 1954 your first year as manager of that cannery? A. Yes, sir.

Q. When you took over as manager, did you make some changes in policy and procedure in the cannery as contrasted with the way it was handled in the preceding years?

A. That's right, I tried to, yes.

Q. Now, was the incident in which you asked Mrs. Storey and [344] Mrs. Layman, I believe you said, to come in—as I understand, it was the first time that you had had at that cannery, under your management, an occasion to call anybody in where you asked them to be accompanied by someone else, is that right? A. Yes.

Q. You did start to say, and you were cut off by Mr. Karasiek on that, that you had had similar occasions, in other canneries that you have operated, to do the same thing, is that right?

(Testimony of Elmo Martini.)

A. I didn't operate canneries. They were wineries that I had, Mr. Berke.

Q. All right, and— A. Yes.

Q. And when you had been operating those wineries, did you have occasion to follow the same practice that you did last year with Mrs. Storey?

A. Yes. [345]

* * * * *

ORICE STOREY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [362]

A. Yes. [345] * * * * *

Direct Examination

Q. (By Mr. Magor): Mrs. Storey, will you now talk so this woman in the back of the audience can hear you, so we can all hear what you say. Will you do that, please? A. Yes.

Q. Are you presently employed, Mrs. Storey?

A. Yes.

Q. By whom are you employed?

A. Teamsters Local 980.

Q. Is that the Charging Party in this matter?

A. Yes.

Q. How long have you been employed by the Teamsters? A. Since about October 1st.

Q. Of what year? A. 1954.

Q. Were you ever employed by the Sebastopol Apple Growers Union? A. Yes.

Q. When were you first employed by that company? [363] A. September, 1953. [364]

* * * * *

(Testimony of Orice Storey.)

Q. Now, at the time you started working for the company in 1954, Mrs. Storey, were you a member of any labor organization? A. No.

Q. Did you sign a pledge card in any labor organization after you started working for the company, in 1954? A. Yes.

Q. Do you recall what day it was?

A. August 4th.

Q. Nineteen fifty—— A. 1954.

Q. Will you tell us what labor organization it was? A. The Teamsters, Local 980.

Q. That is the Charging Party in this matter?

A. Yes.

Q. Will you tell us from whom you obtained the pledge card? A. Mr. Duckworth. [373]

Q. And Mr. Duckworth was—had what position with the company? A. Plant Superintendent.

Q. Will you tell us the circumstances under which you obtained a pledge card from Mr. Duckworth?

A. Well, as I left the plant at the end of the shift on that day——

Q. What time would that have been, Mrs. Storey? A. Four o'clock.

Q. Was anybody with you at the time?

A. My husband.

Q. Anybody else? A. Marjorie Byrd.

Q. What did you do?

A. Well, when I left the plant, I saw Mr. Duckworth and Charlie Williams walking behind two men, going toward the highway.

(Testimony of Orice Storey.)

Mr. Berke: Could you keep your voice up, please.

Q. (By Mr. Magor): Did you know the two men at that time? A. No, I did not.

Q. Have you subsequently learned their names?

A. One of them.

Q. Will you tell us what that one person's name is?

A. Angelo Bertolucci, President of Local 980.

Q. Did you observe Angelo Bertolucci and the other man doing [374] anything at that time?

A. They were handing out cards and literature to the employees.

Q. You say Charlie Williams was with Mr. Duckworth? A. Yes.

Q. Who is Charlie Williams, if you know?

A. Night Foreman.

Q. Did you observe Duckworth and Charlie Williams doing anything?

A. Well, when the men reached the highway, Mr. Duckworth and Mr. Williams came back and stopped by our car.

Q. Where was your car at the time?

A. In the parking lot.

Q. Who was driving? A. My husband.

Q. You say yourself and your husband and Margie Byrd were in the car? A. Yes.

Q. Was anybody with Mr. Duckworth and Mr. Williams? A. No.

Q. Now, will you relate to the Trial Examiner

(Testimony of Orice Storey.)

the conversation that occurred at that time, and tell us what was said?

A. Mr. Duckworth handed me two cards and said, "As you leave, hit that man with these."

Mr. Berke: As you leave what?

Mr. Magor: "hit that man with these." [375]

The Witness: Then Charlie Williams said to my husband, said, "As you leave, do us a good turn and run over that man."

Q. (By Mr. Magor): Was anything else said?

A. No.

Mr. Magor: I'd like to have this document marked for identification purposes as General Counsel's Exhibit next in order.

(Whereupon, the document above referred to was marked General Counsel's Exhibit No. 28 for identification.)

Q. (By Mr. Magor): I show you, Mrs. Storey, a document marked for identification purposes as General Counsel's Exhibit 28, entitled, "Authorization for Representation under the National Labor Relations Act," and I ask you if you can identify that? A. Yes.

Q. I notice a signature thereon. Can you identify that as your signature? A. It is.

Q. I notice the date thereon is August 4, 1954?

A. Yes.

Q. Did you put that date in there yourself?

A. Yes.

(Testimony of Orice Storey.)

Mr. Magor: I formally offer into evidence General Counsel's Exhibit 28. [376]

Trial Examiner: Any objection?

Mr. Berke: No.

Trial Examiner: Do you have a copy of that, too?

Mr. Magor: I beg your indulgence again, Mr. Trial Examiner. I will ask leave to withdraw and make a copy.

Trial Examiner: It will be received, subject to the production of the duplicate.

(The document heretofore marked General Counsel's Exhibit No. 28 for identification was received in evidence.)

Mr. Magor: Thank you, sir.

Q. (By Mr. Magor): Now, Mrs. Storey, showing you again General Counsel's Exhibit 28, is that the card you obtained from Mr. Duckworth?

A. Yes, it is.

Q. Is the date that you signed it the date it shows? A. Yes.

Q. After August 4th, 1954, Mrs. Storey, will you tell us what Union activities, if any, you engaged in?

A. I passed out pledge cards and Union literature.

Q. And where were you, or where did you pass out pledge cards and Union literature?

A. In and about the cannery.

Mr. Berke: Could we, Mr. Trial Examiner,— Would you ask the witness to please try her best to keep her voice up? It [377] just doesn't carry.

(Testimony of Orice Storey.)

Mr. Magor: Will you please speak up a little louder, Mrs. Storey.

Trial Examiner: Speak louder than you normally would.

Mr. Magor: It is difficult to hear you.

(Answer read.)

Q. (By Mr. Magor): To whom did you pass out pledge cards and Union literature?

A. The other employees.

Q. Was this during working hours? A. No.

Q. Will you tell us when it was that you did this?

A. Before and after work, and on my lunch hour.

Q. Can you tell us to——

Mr. Berke: Just a moment. I didn't get it, before and after what?

Mr. Magor: Lunch, and on her——

Trial Examiner: Before and after work, and on her lunch hour.

Mr. Berke: Before and after working hours, and lunch hour?

Trial Examiner: Before and after work.

Mr. Berke: Oh.

Q. (By Mr. Magor): Did you have any breaks during the day? A. Yes.

Q. Will you tell us when you had breaks, to the best of your [378] recollection?

A. During the morning and afternoon.

Q. How long was the break?

A. Ten minutes.

(Testimony of Orice Storey.)

Q. Tell us to the best of your recollection how long your lunch hour was during the 1954 season, while you were employed there? A. One hour.

Q. Can you tell us to the best of your recollection today when that one hour was?

A. Eleven to twelve.

Q. Were you a member of any Union committees, Mrs. Storey? A. Yes.

Q. And what Union committee were you a member of?

A. The day shift, I was on the committee from the day shift at Sagu.

Q. At Sagu? A. That's right.

Q. Were you appointed or elected to that position? A. Yes.

Mr. Berke: Yes what?

Trial Examiner: Appointed or elected, which?

The Witness: Appointed.

Q. (By Mr. Magor): You were appointed; who appointed you? A. Roy Rhodes. [379]

Q. Is Roy Rhodes the same individual who has testified in here previously? A. That's right.

Q. Where were you at the time that he appointed you to the Union committee? A. In my home.

Q. Was anybody else present at the time?

A. No.

Q. Did you attend any Union committee meetings? A. Yes.

Q. And where did you attend those meetings?

A. The Santa Rosa Labor Temple.

Q. Do you recall, to the best of your recollection,

(Testimony of Orice Storey.)

tion, the day when it was that you first attended a Union committee meeting?

A. About the second week in September.

Q. Can you tell us, to the best of your recollection today, the names of any other Union committee members?

A. The original committee was my husband and I, Eva and Leonard Lee, Lena Ameral——

Mr. Berke: Wait a minute.

Trial Examiner: Eva who?

The Witness: Eva and Leonard Lee, Lena Ameral, Leonor Johnson, Mary Russell.

Q. (By Mr. Magor): You say that was the original Union committee, is that correct? [380]

A. Yes.

Q. Was there more than one committee?

A. Yes, yes.

Q. There were others appointed after that?

A. Yes.

Trial Examiner: Excuse me, I'd like to hear the name after Leonor.

Mr. Berke: Johnson, I believe she said.

Trial Examiner: What?

Mr. Berke: Johnson.

Trial Examiner: Johnson? All right.

Q. (By Mr. Magor): What was the last day on which you worked for the Company?

A. September 25th, 1954.

Q. From the time that you first attended Union meetings, until the last day that you worked for the Company, were you on the Union committee?

(Testimony of Orice Storey.)

A. Yes.

Q. Would you tell us to the best of your recollection how many Union committee meetings you attended? A. Approximately one a week.

Q. Will you tell us where these Union committee meetings were held?

A. Santa Rosa Labor Temple.

Q. What was the purpose of the Union committee, Mrs. Storey? [381]

Mr. Berke: I object to that as irrelevant and immaterial.

The Witness: Could I have that again, please?

Mr. Berke: No bearing on the issues here.

Trial Examiner: The purpose of the committee, you say? I will grant that. I will permit that. You mean what were their functions?

Mr. Magor: That's right.

Q. (By Mr. Magor): Do you understand the question? A. I'm sorry, I don't.

Q. All right. What was the purpose of this Union committee, or the functions of that committee, that you were a member of?

A. Well, we made reports, how we were progressing, how many cards we passed out, and received new literature.

Mr. Berke: I am sorry, I just cannot hear her.

Trial Examiner: Can you speak louder, please.

The Witness: I will try. I'm sorry.

Trial Examiner: Will you read what——

Mr. Magor: Will you read it back now so the witness can get her train of thought.

(Testimony of Orice Storey.)

(Answer read.)

Q. (By Mr. Magor): Do you want to continue your answer, Mrs. Storey? A. That's it.

Q. And to whom were these reports made?

A. To the Union representatives. [382]

Q. Now, after you first saw Mr. Bertolucci and the other individual whose name you do not know on the highway at the cannery on August the 4th, 1954, after that did you see any Union representatives out on that highway near the Molino plant?

A. Yes.

Q. Will you tell us when it was after that you first observed them? A. Almost daily.

Q. And what did they do while they were there, to your observation?

A. Well, they used the loudspeaker, told us of the meetings, and sometimes answered our questions that we had asked them.

Q. Did you ever talk to Edna Hardin about the Union? A. Yes.

Q. Will you tell us when, to the best of your recollection, you talked to Edna Hardin?

A. After I became a committee member, I asked her to attend a Union meeting with me.

Q. You say—

Mr. Berke: May we have when?

Mr. Magor: I will lay the foundation, Counsel.

Q. (By Mr. Magor): You say it was after you attended a Union—became a Union committee member? A. Yes. [383]

Q. Will you tell us how long after that it was?

(Testimony of Orice Storey.)

A. About two weeks.

Q. About two weeks. Where were you talking to Edna Hardin?

A. At my place of work, on my ten minute break.

Q. Was anybody else present at the time?

A. My husband was quite near.

Q. Did he engage in the conversation while you were talking to Edna Hardin?

A. Not while I was talking to her.

Q. How far away from you was your husband?

A. About eight feet.

Q. Was anybody else present at the time?

A. No.

Q. What time of day was it, to the best of your recollection today? A. In the morning.

Q. Now, will you tell us, Mrs. Storey, at that time what was said and who said it?

A. I asked her if she'd like to attend a Union meeting with me that night. She said she'd like to but she couldn't.

Q. What occurred thereafter?

A. Then she walked over to my husband and I heard him ask her to attend the meeting that night, and she said she'd like to, but if she did there'd be too much "yak-yak."

Q. Was that all of the conversation? [384]

A. Yes.

Q. You say the last day you worked for the Company—and correct me if I am wrong—was September 25th, 1954? A. Yes.

(Testimony of Orice Storey.)

Q. Before that date, was there any incident with a group of women and Mr. Martini?

A. Yes.

Q. Do you recall when that was; using September 25th, 1954, as a date to use as a basis, how long before that was it? A. About four days.

Q. Will you tell us—Did you have lunch at that time on that day? A. Yes.

Q. Will you tell us what occurred during your lunch hour?

A. The Union representatives were parked on the side of the highway.

Q. Do you recall who they were?

A. Mr. Grami was one.

Q. Where were you at the time?

A. In the car, in the parking lot.

Q. And you say "the car"; whose car were you in? A. My husband's.

Q. Was your husband present? A. Yes.

Q. Was anybody else present with you in the car? [385] A. No.

Q. Were you having lunch at the time?

A. Yes.

Q. Will you tell us about what time this was?

A. Between eleven and twelve.

Q. Will you tell us what occurred at that time?

A. Well, the men on the loudspeaker suggested that we get a committee of six or seven and approach Mr. Martini and ask him if he would consider meeting with the Union representatives in regard to an immediate election.

(Testimony of Orice Storey.)

Q. What did you do then?

A. When I had finished lunch, I walked over to a car parked near and asked the women if they would go with me.

Q. Will you tell us who was in that car, to the best of your recollection today?

A. Elsie Dickerson, Valerie Cuttress and Gertrude Reece.

Q. What did you do then?

A. Well, we started toward the plant and called several other women, and then everybody came.

Q. When you say "everybody," who do you include? A. Most of the women employees.

Q. Where did you go?

A. We went inside the cannery, and was told that Mr. Martini was up in the office.

Q. Who told you that? [386]

A. I'm sorry, I don't know.

Q. What happened then?

A. Well, Leonor Johnson went up the stairs and knocked on the door, came back and told us that Mr. Duckworth said that Mr. Martini was busy and couldn't see us. Then we just stood and waited and Steve Struempf came by and I asked him if he thought it was a good idea for us to speak to Mr. Martini about it. He refused to answer. Then Lila Layman went back and knocked on the door and was told that Mr. Martini was still busy and couldn't see us.

Q. Now, you say Lila Layman went back and

(Testimony of Orice Storey.)

knocked on the door; what door was she knocking on?

A. She went up the stairs and knocked on the office door.

Q. All right. You say everybody was there. Could you tell us approximately how many people were there? A. More than seventy.

Q. And were these women, men, or both women and men? A. Mostly women.

Q. What shift was this? A. The day shift.

Q. Now, after Lila Layman came back and said Martini was busy, what happened then?

A. The whistle blew, then everybody rushed over and checked their cards and started back to work.

Q. When you say checked their cards, would you tell us what [387] physically they did?

A. The timecards, the time clock, we punched in on the time clock.

Q. What occurred then?

A. We started back to work, and some of them had arrived at their place of work, and then I saw Mr. Martini coming down the stairs with my husband.

Q. And what is your husband's name?

A. C. E. Storey.

Q. What does the "C" stand for?

A. Clarence Edward Storey.

Q. You saw your husband and Mr. Martini coming down the stairs, is that correct? A. Yes.

Q. What did you do then?

(Testimony of Orice Storey.)

A. Martini called out and asked what was wrong, he asked what was wrong.

Q. Did anybody answer?

A. No one answered him, so I turned and went back and asked him if he would consider meeting with the Union representatives.

Q. You say you turned and went back; where did you go back to?

A. I went back about half way across the cannery.

Q. Was anybody with you when you asked him this?

A. Most of the women were standing around.

Q. What did he say when you asked him this question?

A. He said, "No, Ma'am, I am not," that he was willing to have an election but he couldn't until the Board decided.

Q. What was said then, if anything?

A. Lila Layman says, "Oh, that same old stall," and then I turned my back and told the women to go back to work.

Q. What did the women do?

A. Everybody went back to work.

Q. Do you recall, to the best of your recollection, what time it was that you went back to work on that day?

A. About two or three minutes after twelve.

* * * * * [389]

Q. (By Mr. Magor): Now, after talking to

(Testimony of Orice Storey.)

Mr. Martini on the date that you have referred to, what did you do then?

A. We went to work.

Q. Anything occur that afternoon at all?

A. Yes, about 3:30, Mr. Duckworth came to me and said Mr. Martini wanted to see me in the office.

Q. Where were you at the time Mr. Duckworth came to you? A. I was working.

Q. Was anybody else present at the time?

A. The other workers were working.

Q. What did you say to Mr. Duckworth, if anything? A. Nothing.

Q. What did you do then?

A. I started to go up to Mr. Martini, up to the cannery office, and I saw Lila Layman at the head of the stairs, going up too. I went in the office, and Mr. Duckworth followed me in.

Q. And what office did you go into?

A. The cannery, the office that is in the cannery.

* * * * * [398]

Q. (By Mr. Magor): Now, who else was present in the office at that time?

A. Mr. Martini, Lila Layman, Mr. Duckworth and I.

Q. Will you tell us now, Mrs. Storey, to the best of your recollection today, what was said and who said it?

A. Mr. Martini did the talking mostly. He started out by saying he was very disappointed in me, that he knew me, he didn't know the other women that worked there, but he did know me and

(Testimony of Orice Storey.)

watched me and knew I was a good worker, and he didn't think I'd be taken in by those Union guys. He asked me why I was doing it, and I told him money, and did he think 95 cents was adequate pay for what we were doing. He said he didn't know, but I'd have to remember that he always took care of us and we had our jobs back each year, and anyway the Union just—the men just wanted our initiations and dues, and that once we were in the Union we'd be assessed from five to twenty-five dollars and be worse off than we were then. Then he told me he'd done everything he could, he'd been to a hearing, but he couldn't have an election until the Board decided. Then he asked me if I knew who the NLRB always favored. I said I thought they were fair and impartial and he said no, they always favored unions. Then he told me that the Union wasn't interested in me as a person or in my community, to think it over good, and not get involved in anything that wouldn't do me [399] or anyone else any good. Then he told me that he had been talking to my husband that day, and he said, I told him and now I am telling you that I will not have you talking up this union thing on cannery property; and he said, I know what you are doing, Mrs. Storey, and I said, but not on your time, Mr. Martini. He said, well, I have told your husband, now I am telling you, I will not have it. Then he told me that he didn't think the people wanted an election and if we had one he thought we couldn't win. I told him if he felt that way

(Testimony of Orice Storey.)

why not consent to an immediate election. He said it was too much trouble, for me to think it over good and not make any mistakes. Then he told me that if we did win an election we'd be worse off because they'd just signed a contract at Watsonville for 90 cents an hour. I asked him if that was Teamsters, and he said yes. I asked for the name of the cannery and he told me he thought that it was Mann's Cannery. I told him I'd check it, and he said, well, he wasn't sure, he thought that was the name. Then he cautioned me again to think it over good and not make any mistakes, and not get involved in anything that wouldn't do me or anybody else any good.

Q. Recall anything else of the conversation?

A. No.

Q. How long were you in there, Mrs. Storey, in the office at that time?

A. From 3:30 to 4:20. [400]

Q. What time do you normally go home?

A. Four o'clock.

Q. Does the whistle blow at all?

A. At four.

Q. Did you hear the whistle while you were in the office? A. Yes. [401]

* * * * *

Q. And on this date in question, what time did you go home on that day? A. Four o'clock.

* * * * * [402]

Q. (By Mr. Magor): You say September 25th was the last day that you worked? A. Yes.

(Testimony of Orice Storey.)

Q. Did you work the day before that?

A. Yes.

Q. Will you describe your physical condition at that time?

A. I had an awful cold, asked Edna Hardin several times for aspirins.

Q. And what did she do, if anything?

A. She always brought them to me.

Q. Did you have any conversation with Edna Hardin about your physical condition on that day?

A. Yes.

Q. Will you tell us?

A. In the afternoon I asked—she suggested that I go in the lounge room and lay down.

Q. Do you recall what time it was, what time of day it was, to the best of your recollection?

A. About three.

Q. Was anybody else present at the time?

A. No. [408]

Q. What did you do then?

A. I was there when the work stopped for that afternoon.

Q. And why did the work stop, if you know?

A. There was a breakdown, I think.

Q. Now, on September 25th, was that a Saturday?

A. Yes.

Q. Was that the last day you worked for the Company?

A. Yes.

Q. Would you describe your physical condition on that day?

(Testimony of Orice Storey.)

A. I still had a cold and was still—asking Edna Hardin for aspirins.

Q. And did you work—Strike that.

I believe the Trial Examiner asked you earlier how long you would work on a Saturday. What time did you stop work on Saturday?

A. Till 12 Noon.

Q. Did you work till 12 Noon on this day?

A. No.

Q. What time did you stop working?

A. At 11:24.

Q. And did you punch out at that time?

A. Yes.

Q. Prior to punching out, did you speak to any representative of the Company?

A. I asked Edna Hardin for permission to punch out. [409]

Q. Did you tell her why you wanted to punch out? A. I told her I was sick.

Q. What did Edna Hardin have to say?

A. She gave me permission to go and punch out.

Q. And you did then punch out, is that correct?

A. Yes, I did.

Q. Now, you say you—Strike that.

On this day how did you come to work?

A. With my husband.

Q. And did you walk or did you drive a car or what? A. In the car.

Q. And where was your car at the time?

A. In the parking lot.

Q. Where is the parking lot located?

(Testimony of Orice Storey.)

A. In front of the cannery, a little to the left of the entrance door.

Q. After punching out, will you tell us what you did, Mrs. Storey?

A. I punched out and went to the car. It was hot, and I rolled the glasses down and opened the door and returned to the cannery.

Q. Why did you return to the cannery?

A. To wait until the car cooled.

Q. And where did you return when you went back to the cannery?

A. I came in and stood by the desk where the floor lady kept [410] her applications and gloves and things that she gave out to the people. [411]

* * * * *

Q. What did you do when you got to that application desk, Mrs. Storey, if anything?

A. I stood there, and then three women on one of the benches called me over to talk to me.

Q. Do you recall who those women were?

A. I don't know their names, night shift employees.

Q. And did you talk to them? A. Yes.

Q. How long were you talking to them? [412]

A. A few minutes.

Q. What were you discussing?

A. They wanted to know the name—the place, the location and time of a union meeting that we were going to have the following week. I gave them the time and location and asked them to come. Then they told me they heard one of the women said she

(Testimony of Orice Storey.)

had heard that I was on the committee, and she too would like to be on, and how should she go about it. I told her to call Mr. Angelo Bertolucci, and that his name was in the telephone book. Then she said, Mr. Martini sees me talking to you, and turned her head. Then I walked back and stood by the desk.

Q. And did you see Mr. Martini?

A. No, I didn't see him. [413]

* * * * *

Q. (By Mr. Magor): What occurred then, if anything, Mrs. Storey?

A. I came back and stood by the desk and Virginia Chicano—

Q. Would you spell the name, please?

A. C-h-i-g-a-n-o.

Mr. Karasick: I have also seen it C-h-i-c-a-n-o. Do you know, is it C-h-i-c-a-n-o or g-a-n-o?

The Witness: It has a "g" in it, I'm sure, I'm sure.

Mr. Karasick: It has a "g"?

The Witness: Yes.

Mr. Caldwell: C-h-i-c-a-n-o.

Mr. Magor: So stipulated.

* * * * *

The Witness: She came and sat on the bench next to me [414] where I was standing, and asked me how the Union was doing. I told her fine.

Mr. Berke: Just a moment. I will object to this as not binding on the Respondent, it is irrelevant and immaterial, these conversations between these

(Testimony of Orice Storey.)

individual employees, not shown to have been in the presence of any Company representatives.

Trial Examiner: Excuse me. If there is no showing that this was overheard by a Company representative, I think it can be stipulated—

Mr. Magor: It may go out.

Q. (By Mr. Magor): How long were you talking to Virginia Chicano?

A. Not more than a minute.

Q. What occurred then, if anything?

A. Edna Hardin came and told me that Mr. Duckworth wanted me to wait outside the cannery.

Q. What did you say, if anything?

A. I asked her way. She walked away and didn't answer. [415]

* * * * *

Q. What happened then, if anything?

A. Mr. Duckworth came over and asked me if I would wait outside the cannery. I asked him why, and if I was in the way. He said yes, you are definitely in our way. Then he said, "Would you go outside," and I said, "Well, it's awful hot outside." He said, "I don't care how God-damned hot it is on you. Will you go outside." He pointed toward the front door. I turned and started toward the back and then he said, "Punch out." I said, "I have," and he asked Edna Hardin, said, "Has she punched out?" She said "Yes," and then I went out the back door and into the parking lot.

Q. What did you do then, when you got to the parking lot? A. I waited.

(Testimony of Orice Storey.)

Q. Where did you wait? A. In the car.

Trial Examiner: Excuse me. How long was it after Edna [416] Hardin had left you that Mr. Duckworth came over?

The Witness: Just seconds.

Trial Examiner: Is the back door the one on the east side?

The Witness: This.

Trial Examiner: On the south side?

The Witness: Yes, south.

Q. (By Mr. Magor): Now, before and after shifts, have you ever waited in the location that you have just testified to? A. Yes.

Q. And have you observed other employees waiting there in that same location?

A. They always wait there.

Q. Is that before and after shifts?

A. Yes.

Q. During break periods? A. Yes.

Q. Before this date that you have just testified to, had you or anybody else to your knowledge ever been ordered away from that point? A. No.

Q. Or told not to wait there? A. No.

Q. What time of day was it that you left the cannery property that day, to the best of your recollection today?

A. You mean after Mr. Duckworth spoke to me?

Q. That's right, after you say you went out and waited in the car.

A. About—shortly after 11:30.

Q. Is that the time that—Did your husband

(Testimony of Orice Storey.)

come out then at 11:30? A. No.

Q. What time did he come out?

A. Twelve noon.

Q. And what did you do then, when your husband came out? A. We went home.

Q. Did you talk to any representative of the Company after that, on that same day?

A. After arriving home I called Edna Hardin and asked her if I had been fired. She told me she didn't know, But Mr. Duckworth had taken my card from the rack.

Q. Why did you call Edna Hardin?

A. Because my husband told me that I had been fired.

Q. When did he tell you that?

A. He said that they came out and discussed it with him, and he was sure that I had been fired.

Q. When was it that your husband told you this? A. When he came to the door.

Q. What did you do, if anything, on that same day, after talking to Edna Hardin, or before—after leaving the——

A. I called the doctor and made an appointment with him to see [418] him at one o'clock.

Q. Did you see the doctor on that day?

A. Yes.

Q. Did you get a receipt from the doctor?

A. Yes.

Q. Who is your doctor, Mrs. Storey?

A. Dr. Vieira.

Mr. Magor: I'd like to have this document

(Testimony of Orice Storey.)

marked for identification purposes as General Counsel's Exhibit next in order.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 30 for identification.)

Q. (By Mr. Magor): I show you, Mrs. Storey, what has been marked for identification purposes as General Counsel's Exhibit No. 30, and I ask you if you can identify that.

A. It is a receipt for where I paid for an office call, September—September 25th.

Q. And the date on there is indicated as October—

A. I paid it on October 27th.

Q. 1954? A. 1954.

Q. The date indicated on it is September—

A. September 25th.

Q. I mean, the date October 27th, 1954? [419]

A. Oh, yes, that is the date I paid it.

Q. From whom did you receive it?

A. Pardon?

Q. Who did you receive this from?

A. Dr. Vieira's office nurse.

Mr. Magor: I see. I formally offer into evidence General Counsel's Exhibit No. 30 and want the record to note that I have offered that exhibit in duplicate.

Mr. Berke: I object to it on the ground it is irrelevant and immaterial, no proper foundation has been laid for it, it is dated October 27th, it is not by the doctor, it is somebody who is identified as being his nurse. I submit that the proper person

(Testimony of Orice Storey.)

to testify to this would be the doctor, or person who made it. It's irrelevant and immaterial in that respect.

Mr. Magor: I submit it's been properly identified.

Trial Examiner: Pardon me?

Mr. Magor: I submit that it's been properly identified.

Trial Examiner: May I ask if you saw this signed?

The Witness: Yes.

Mr. Berke: There's self-serving statements in there in any respect, I don't have the opportunity to cross examine the doctor or his nurse, or whoever it was that made it.

Trial Examiner: If you don't have an opportunity, Mr. Berke, before the Respondent's case comes on, let me know and I will grant you time. I will receive this in evidence. [420]

(The document heretofore marked General Counsel's Exhibit No. 30 for identification was received in evidence.)

Mr. Berke: You mean I have got to bring him in?

Trial Examiner: If you contest this, yes.

Mr. Berke: I think it is up to them to prove it is properly presented here.

Mr. Magor: I don't think it is necessary at all, Mr. Trial Examiner. This is a receipt she's received from the doctor.

Trial Examiner: I will accept it in evidence.

(Testimony of Orice Storey.)

Q. (By Mr. Magor): After September 25th, 1954, Mrs. Storey, did you go back to the plant at all? A. Yes.

Q. After that day? Do you recall when it was, to the best of your recollection that you next went out there?

A. The following Monday, after having been discharged or ordered to leave the cannery on the 25th.

Q. You say that was on the following Monday?

A. Yes.

Q. What time of day was it that you went out there? A. During the lunch hour.

Q. Did you talk to any representative of the Company at that time? A. Yes.

Q. To whom did you talk? [421]

A. Mr. Martini.

Q. Who was present with you at the time?

A. My husband and Margie Byrd.

Q. Where were you talking to Mr. Martini?

A. Right in front of the cannery entrance.

Q. What time of day was it, to the best of your recollection today?

A. Between 11:30 and 12:00.

Q. Was anybody present with Mr. Martini?

A. One man.

Q. Do you know who he was? A. No.

Q. Do you know him today? A. No.

Q. Will you tell us now, to the best of your recollection, what was said and who said it?

A. We met Mr. Martini and I said, "You are

(Testimony of Orice Storey.)

just the man I wanted to see." He asked me why, and I said, "Have I been fired?" and he said, "Yes, Ma'am, you are fired and that's final." I asked him why, if my work was satisfactory, and he said, "Yes, you were a good worker, but I cannot have you talking up this union thing and agitating among the other girls and forming committees." Then he said, "You are fired and that's final and your husband has your check." I asked him if he knew I was on the committee from the day shift, and he said he didn't give a [422] damn what committee I was on.

Q. Is that all you recall of the conversation?

A. Then he added again, and said, "You are fired and that's final." Then he walked away.

Q. Have you exhausted your recollection?

A. Yes.

Q. Was anything said by him about having girls—that he had girls that had heard you talking about the committee? A. No. [423]

* * * * *

Q. (By Mr. Magor): You have given us the complete [424] conversation to the best of your recollection, have you not, Mrs. Storey?

A. Yes.

Q. Now, I ask you again, did Mr. Martini at that meeting and at that time state to you and Lila Layman that he actually admired your fight and Lila Layman's fight, too? A. No.

Q. Did Mr. Martini at that time, and in that meeting, say, in words and effect, do me a favor and cease from having conversations in the building

(Testimony of Orice Storey.)

proper which would disturb production in the plant?

The Witness: Will you repeat that, please?

Trial Examiner: Read it.

Mr. Magor: Will the Reporter please read it back.

(Question read.)

A. No.

Q. (By Mr. Magor): Did Mr. Martini at that meeting and at that time say in words and effect that you could use one of the boxes and you didn't even have to be off the grounds, and you could do anything that you wanted? A. No. [425]

* * * * *

Q. Now, I ask you, Mrs. Storey, if at any time while you were working for the Company, whether you noticed anything unusual in the belt or in the water or on the belt? A. Yes.

Q. Will you tell us what it was?

A. Rubber balls. [426]

Mr. Berke: Well, may we have a foundation?

Trial Examiner: Yes, be a little more specific.

Q. (By Mr. Magor): Will you tell us when it was? A. During working time.

Q. And what year was it, what season?

A. Both 1953 and 1954.

Q. Let's take the 1953 season first. Can you recall when it was in the 1953 season that you observed anything unusual?

A. During the last, latter part of the season, I remember seeing a mouse in the water.

Q. And where did you see this mouse?

(Testimony of Orice Storey.)

A. I saw Tony Bondi pick the mouse off the belt and put it in a tin can and walk over and put it in the apples. Then he ran inside and said he wanted to see what the girls would do when the mouse got inside the cannery.

Q. And what did the girls do, to your observation?

A. I heard them screaming, and he came back laughing, and also the floor lady was laughing, and said it created quite a disturbance.

Q. Who was the floor lady?

A. Carmelita Montafei.

Q. And where did he put this mouse?

A. In the flume with the apples.

Q. And—you say in the flume with the apples?

A. Yes.

Q. Where do the apples go from the flume?

A. Well, he put it in—outside in the flume and then it would flow inside the cannery.

Q. And when it came inside, where would it go to?

A. To where the girls were working.

Q. And what kind of work were the girls doing?

A. Peeling and trimming.

Q. Is that the water in which the apples are that they are peeling and trimming?

A. Yes.

Q. And is that what the mouse was in?

A. Yes.

Q. Now, that is in the 1953 season. Can you tell us when it was in the 1954 season that you observed anything unusual?

A. Practically every day.

(Testimony of Orice Storey.)

Q. Is that while you were working there?

A. Yes.

Q. And can you tell us what you observed?

A. Rubber balls, rubber mice, apples with bows of ribbon on them.

Mr. Berke: Apples with what?

The Witness: Bows of ribbon, rubber gloves with cores pushed down in the fingers, and once a live mouse. [428]

* * * * *

Q. (By Mr. Magor): Did you observe who put these articles in that you have just testified to, Mrs. Storey? A. Not all of them.

Q. Will you tell us the ones that you can recall, and name the article?

A. Well, I put the rubber ball in.

Q. Where did you put the rubber ball, Mrs. Storey?

A. It came by in the flume, floated past me and then Oliver Papera brought it back and suggested I put it back in, and I did.

Q. Who is Oliver Papera?

A. One of the workers there. I think he is the oiler. [429]

Q. Was any representative——

Mr. Berke: Think he was what? I'm sorry.

Trial Examiner: Oiler.

Q. (By Mr. Magor): Was any representative of management present at the time? A. No.

Q. And where did you put this rubber ball?

A. In with the peeled fruit.

(Testimony of Orice Storey.)

Q. And where does the peeled fruit go?

A. Into the squirrel cage.

Q. On the belt in front of the trimmers, the water in front of the trimmers?

A. Yes, that's right.

Q. Now, what else did you say you observed during the 1954 season?

A. Rubber mice, rubber gloves with cores in the fingers; looked very much like a hand floating along.

Q. Now, do you recall when it was that you saw the rubber mice?

A. About three weeks before I was discharged.

Q. Do you recall, or do you know who put it in the water? A. No.

Q. Do you recall what happened?

A. The mouse was—well, he was riding along on an apple.

Trial Examiner: That is the rubber one? [430]

The Witness: No, sir this was a live mouse.

Mr. Berke: I thought he was asking about the rubber one.

The Witness: Then the girls started screaming and laughing and Mr. Duckworth ran down behind the trimmers, and then he came back by me and I asked him what happened, and he said, "Oh, it was a bit of a mouse," and measured like that, and he said—and then he laughed and told me one of the girls said it was a rat this long. He said it wasn't. It jumped out and went on the floor.

(Testimony of Orice Storey.)

Trial Examiner: Let the record show that the witness first indicated a measure of about three-quarters of an inch, and finally about six inches.

Mr. Magor: It is agreeable to me.

Mr. Berke: Yes.

Q. (By Mr. Magor): Now, will you tell us, with the rubber mouse, when that was, when was it that you observed the rubber mouse?

A. About the same time.

Q. Do know who put that in the water?

A. Yes.

Q. Who was it? A. Janet Woods.

Q. And what did you observe about that?

A. She brought the mouse to work in the morning and gave it to me to keep, and at noontime she asked for it back, then put it [431] in the water, and he floated all the way through, and he was picked out on the second trim belt.

Q. And where was the second trim belt?

A. It follows the squirrel cage. He left the first trimming, went through the squirrel cage, and then onto the second trim belt.

Q. Do you know who picked it out of the water?

A. No, I do not.

* * * * *

Q. (By Mr. Magor): Was anything said in your presence by management with respect to the rubber mouse? A. No, they laughed about it.

Trial Examiner: Who is "they"? [432]

Q. (By Mr. Magor): Tell us who laughed about it? A. Edna Hardin.

(Testimony of Orice Storey.)

Q. Who? A. Edna Hardin.

Mr. Berke: I move that be stricken as not responsive, was anything said, she said no. Any beyond that I move be stricken.

Trial Examiner: Well, Counsel could ask the question anyway. I will let it stand. However, I would like the time when this occurred, if you will.

Q. (By Mr. Magor): Can you tell us, to the best of your recollection, when this was?

A. About three weeks before I was discharged.

Trial Examiner: Now, may I ask one more question there.

Mr. Magor: Surely.

Trial Examiner: Do you know what came to her attention that she laughed about?

The Witness: She said the mouse looked very much—the rubber mouse looked very much alive.

Q. (By Mr. Magor): Now, you said you saw a rubber glove with a core in the finger?

A. Yes, that's quite common.

Q. And you say it's quite common; have you observed it once or more than once?

A. Yes, more than once. [433]

Q. Is that during the 1954 season?

A. '53 and '54.

Q. Would you describe that so the Trial Examiner will understand what you are talking about?

A. Most of the women there wear rubber gloves to work, so when they—someone pushes the apple,

(Testimony of Orice Storey.)

the cores down in the fingers of the gloves and then puts it in the water.

Q. What would the rubber glove do then, if anything?

A. Float along with the peeled fruit.

Q. Was any representative of management there at the time or times that you observed this?

A. No.

Q. Have you ever seen an apple with a core stuck in it that has been peeled and sliced?

A. Yes.

Q. How often have you observed that?

A. Almost daily.

Q. And would you describe for the Trial Examiner, so he will know what you are talking about, what you have observed?

A. Well, some of the machines leave the core in, they either fall in or are put in with the core in, and then some of them that someone puts back in part way, and it's put back in the water, and it goes bobbing along with the core out.

Q. And do you know why, or have you observed any—Strike that. [434]

Have you observed anybody doing that?

A. No, not just that type of apple.

Mr. Berke: Well, in view of that last answer, I move her previous one be stricken, not based on her knowledge.

Trial Examiner: Read the question for me, will you please.

(Question and answer read.)

(Testimony of Orice Storey.)

Trial Examiner: What do you mean by "that type of apple"?

The Witness: Well, I have seen them with faces made on them put in the water, and with little arms, but not just one core.

Q. (By Mr. Magor): All right. Would you describe now for the Trial Examiner just what you are talking about, with faces and little arms, so we will understand?

A. They take an apple and make eyes and nose and mouth on it, then insert cores on either side for arms, sometimes legs. The one I saw was minus legs, but it had two arms.

Q. When did you observe that?

A. The girl next to me made it.

Q. Who was the girl next to you??

A. Marjorie Byrd.

Q. And when was this?

A. During the '54 season.

Q. How long before you were discharged, do you know that?

A. Some six weeks.

Q. Where did you observe the apple? [435]

A. She put that one in the water, made three others and sat them on the machine in front of us.

Q. What happened to the one that she put in the water, if you know?

A. It floated away.

Q. And you say she made others and put them on the machine?

A. Yes.

Q. And would you describe those, so the Trial Examiner will know what you are talking about?

(Testimony of Orice Storey.)

A. She made little eyes and nose and mouth and ears.

Q. And how would she make the eyes and the nose and the mouth and the ears?

A. With the trim knife.

Q. And would she take pieces out of the apple to make that?

A. Pieces out, and then take a piece of peel and even put in colored eyes with peelings.

Q. And where did you observe those apples?

A. Along in front of the machine, in front of where we stood to work.

Q. All right. Now, what machine are you talking about? A. The peeling machine.

Q. Now, was any representative of management, to your knowledge, present, or did they observe those apples? A. Yes.

Q. Will you tell us who it was? [436]

A. Edna Hardin.

Q. What was said, if anything?

A. She told Marjorie Byrd that she made the prettiest dolls of all; everybody made them but hers were best.

Q. Was Marjorie Byrd ever discharged for decorating apples, to your knowledge? A. No.

Mr. Magor: You may examine.

Trial Examiner: Before you begin, I just want to get clear on that one thing. I'd like to know whether or not that was a part of Edna Hardin's statement, or whether that was something that you

(Testimony of Orice Storey.)

added as an explanation, that everybody made them but hers were best.

The Witness: She said that.

Trial Examiner: All right. Mr. Berke?

Cross Examination

Q. (By Mr. Berke): What date was this that Mrs. Hardin said this?

A. I don't recall the date.

Q. What time of the day was it?

A. During working hours.

Q. What time? A. I don't know.

Q. You don't know the date, you don't know the time of day. Now, the statement you attribute to Mrs. Hardin are her exact words, word for word?

A. To the best of my knowledge. [437]

Q. Those apples that Mrs. Hardin referred to were not apples that were put in the water to go down the line, were they? A. No.

Q. Where were they?

A. On the machine in front of us.

Q. Now, Mrs. Storey, as I understand it, there is a ladies' restroom and a ladies' lounge; is that two or one room? A. Two.

Q. Two rooms. And what is in the ladies' restroom?

A. The toilets and the wash basins.

Q. I see. And what is in the lounge?

A. Two cots.

Q. Any chairs? A. No.

Q. But two cots? A. And a table.

(Testimony of Orice Storey.)

Q. Yes. You didn't use the ladies' lounge the day you were ill, that you left early, did you?

A. The 25th?

Q. Yes. A. No.

Q. You didn't go in there and lie down on those cots, did you?

Mr. Magor: Object to it, on the ground it is immaterial.

Mr. Berke: Well,— [438]

Trial Examiner: Overruled.

The Witness: The night shift employees were seated—

Q. (By Mr. Berke): Just answer my question, please. You did not go in there to use those cots?

A. I couldn't get in.

Q. You couldn't get in?

A. It was full of people.

Q. Did you try to go in?

A. I looked in the door.

Q. When?

A. When I came back from the parking lot.

Q. I see. You didn't testify under direct examination that you made any effort to go in the lounge, did you? A. No.

Q. Now, does your job require you to stand at your position? A. Yes.

Q. And you were quite ill that day, you say, is that right? A. Yes.

Q. And you were ill the day before?

A. Yes.

Q. So ill that you felt you couldn't stand at your

(Testimony of Orice Storey.)

work and had asked Mrs. Hardin, your floorlady, to allow you to leave before your shift was over, is that right? A. Yes.

Q. However, despite the fact that you were ill, you stood [439] there at the application desk, as you call it? A. Yes.

* * * * *

Q. (By Mr. Berke): Mrs. Storey, I show you a document marked for identification as Respondent's Exhibit No. 1, which purports to be your time card for the week ending September 25th, 1954, and ask if you have ever seen that card before?

A. Yes.

Q. And you saw it as recently as yesterday, did you not? [440] A. Yes.

Q. It was shown to you by Mr. Magor?

A. Yes.

Q. Is that where you got the 11:24 from?

A. No.

Q. Isn't that the time on the card that you saw yesterday? A. Yes, yes.

Q. And so, as I understand it, for approximately—well, strike that.

What time did your husband's shift end that day?

A. Twelve.

Q. So, as I understand it, for approximately thirty-six minutes or so you stood there at the application desk?? A. Yes. [441]

* * * * *

Q. Now, you were trying to get Mr. Martini to meet with Roy Rhodes, was that your object?

(Testimony of Orice Storey.)

A. The Union representatives.

Q. Well, what was the language you used when you were talking to Mr. Martini about it?

A. Could you explain that, please?

Mr. Berke: Will you read the question, please.

(Question read.)

The Witness: Union representatives.

Q. (By Mr. Berke): And what did you want him to do about the Union representatives, just tell us what you said.

A. I asked him if he would meet with the Union representatives in regards to an immediate election. He said no, he would not.

Q. Go ahead, was there anything more to the conversation?

A. Said that he would, was willing to have an election, but he couldn't until the Board decided.

Q. And at the time that you made this request of Mr. Martini, you knew that there was a proceeding pending before the National Labor Relations Board, did you not? [459]

* * * * *

The Witness: I knew that we wanted an election.

Q. (By Mr. Berke): The question was, you knew, Mrs. Story, at that time that there was a proceeding pending before the National Labor Relations Board concerning an election among the employees at that plant, did you not?

A. I knew of something, but not exactly what.

Q. Well, you were a member of the day shift committee of Sagu, were you not? A. Yes.

(Testimony of Orice Storey.)

Q. And you went to Union meetings pretty regularly, did you not? A. Yes.

Q. And at those meetings there were reports made, were there [460] not, about what was going on in connection with organizing the employees at Sagu? A. Yes.

Q. And wasn't the matter of the proceedings before the National Labor Relations Board discussed? A. Yes.

Q. So then you did know that at the time you put the question to Mr. Martini, that there was a proceeding pending before the National Labor Relations Board?

Mr. Magor: Just a moment. I am going to object to it on the ground it is argumentative, that it's been asked and answered. She said she knew there was some proceeding, or some proceeding before the NLRB.

Trial Examiner: Overruled.

Go ahead and answer it.

The Witness: I knew there was something pending. I don't recall exactly what.

Q. (By Mr. Berke): I see. Is your memory better on some things than it is on others, Mrs. Storey?

Mr. Magor: Objected to as argumentative.

Trial Examiner: Overruled.

A. Certain dates, yes. [461]

* * * * *

Q. (By Mr. Berke): Will you tell us all the conversation as near as you recall it that you had

(Testimony of Orice Storey.)

with Mr. Martini on that particular occasion, talking now about the conversation relating to the meeting with Union representatives.

A. I asked him if he would consider meeting the Union representatives in regards to an immediate election. He said no, and that he was willing to have an election, but he couldn't until the Board decided. [462]

* * * * *

Q. You didn't say anything at all after that?

A. I may have, but I don't recall it.

* * * * *

Q. You didn't? Now, following September 25th, the day you were discharged, you say you came back to the plant the next Monday? A. Yes.

Q. Now, and your purpose in coming back was to find out [464] whether you actually had been discharged, was that it? A. Yes.

Q. And you say you talked to Mr. Martini on that occasion? A. Yes. [465]

* * * * *

Q. Did you go back there on your own, or did you talk over the situation before you went back on that Monday with one of the Union representatives? A. I did.

Q. You did? With whom? A. Mr. Grami.

Q. And was it Mr. Grami that suggested you go back?

A. He said since they hadn't told me definitely that I was fired, perhaps I wasn't.

Q. Mr. Grami told you to go back and see if

(Testimony of Orice Storey.)

you could find out whether you were fired for union activity? A. No.

Q. Did he say anything to that effect?

A. No.

Q. Was Mr. Grami with you when you went back? A. No.

Q. Was there anyone from the Union with you when you returned that Monday?

A. You mean as I talked to Mr. Martini?

Q. Not as you were standing there, but did anyone come into the plant with you?

A. Mr. Bertolucci.

Q. He is the Union representative? [468]

A. Yes.

Q. Where was he at the time? That you arrived there? A. He left me off at the highway.

Q. And did he remain in his car?

A. He drove away.

Q. You saw him drive away? A. Yes.

Q. After you finished talking with Mr. Martini, did you turn around and make a sign with your hand to anyone? A. I don't recall.

Q. You don't recall? Don't you recall putting your index finger and your thumb together and turning around after you finished talking with Mr. Martini and making this kind of a motion with your hand, which generally indicates everything is fine, or you got what you wanted?

Mr. Magor: Just a moment.

Q. (By Mr. Berke): Do you recall making that——

(Testimony of Orice Storey.)

Mr. Magor: Mr. Berke would like to testify, I know. That is asking for an opinion and conclusion of the witness.

Trial Examiner: Sustained.

Q. (By Mr. Berke): You know what that sign is that I have just made, don't you? You have seen that sign made before, haven't you?

A. I have made it.

Q. You have made it? [469] A. Yes.

Q. Now that we have qualified her as an expert, maybe we can go ahead.

Did you make that sign that day after finishing talking with Mr. Martini?

Mr. Magor: Just a moment. I object to it on the ground that it is vague and indefinite and unintelligible for the record.

Mr. Berke: I have already described it for the record.

Trial Examiner: Overruled.

Q. (By Mr. Berke): You say you don't recall? Was that your answer? A. I don't recall.

Q. You don't recall. As a matter of fact, Mrs. Storey, you went back there for the express purpose to see if you couldn't find out— Strike that.

As a matter of fact, you went back there for the express purpose of trying to determine whether you had been fired for Union activity, isn't that correct?

A. Went back to find out if I was fired. [470]

* * * * *

Q. (By Mr. Berke): Mrs. Storey, I show you again Respondent's Exhibit 1 for identification,

(Testimony of Orice Storey.)

which is your time card, is it not? A. Yes.

Q. The date that appears on there and the times are stamped on there at the time clock, are they not? A. Yes.

Q. And you are the one that inserts the card and stamps it, punches the clock? A. Yes.

Mr. Berke: I offer Respondent's 1 in evidence.

Trial Examiner: Any objection?

Mr. Magor: No, sir. [473]

* * * * *

Q. (By Mr. Berke): Mrs. Storey, during the time that you worked at Sagu last year, you saw a fork-lift in operation, did you not? A. I did.

Q. And would this fork-lift be in operation in the cannery where you were working? A. Yes.

Q. And is it correct to say that the fork-lift, during working time and during the period that you were working there, was constantly moving in and around the cannery, moving tanks and other items? A. Yes.

Q. And is it correct that the fork-lift would move or raise tanks of apples to the top of the blancher? A. Yes.

Q. And you saw that while you were working there, did you not? A. Yes. [474]

* * * * *

Q. (By Mr. Berke): Is that blancher that you saw the fork-lift raise the tank of apples to the same as the one that is indicated on here as blanch?

A. Yes.

Q. And that is the one here where you have

(Testimony of Orice Storey.)

put the "S" in a circle, is that right? A. Yes.

Q. You have seen these tanks both when they are empty and when they are filled with apples and water, have you not? A. Yes.

Q. They are pretty large tanks, are they not?

A. Yes.

Q. Do you have any idea about what they weigh?

A. No.

Q. Do you have any idea about what their capacity is? A. No.

Q. And I take it that during the time that you worked there, Mrs. Storey, you saw the fork-lift move in and out with tanks, either empty or filled with apples, to the point where you were standing when you talked with Mr. Martini about meeting with Union representatives? A. Yes.

Q. Mrs. Storey, how do the women there work, or—at the [475] time, I should say, while you were working there, how did the women who were working on the slicing machines stand, that is, what direction were they facing?

A. They would face to the east.

Q. Looking at General Counsel's Exhibit 23, will you note "Slicing Units" indicated on there. Now, is that where the slicing machines are, or were at the time you worked there? A. Yes.

Q. And then you will also note "Inspection Slices;" is that the inspection belt or the inspection station, or what is that? A. Yes.

Trial Examiner: Inspection belt?

The Witness: Yes.

(Testimony of Orice Storey.)

Q. (By Mr. Berke): When you saw the women working on the slicing machines, facing east, is it correct that they would be looking toward the balcony or towards the restrooms? A. Yes.

Q. And that would be toward the time clocks also, would it not? A. Yes.

Q. While you worked there, do you know whether one of the women working on the slicers was injured? A. On the slicer?

Q. Yes, on the slicing machines.

A. No. [476]

Q. You don't recall, or you don't know?

A. I don't recall.

Q. Did you know Marie Scheffler while you worked there? A. Yes.

Q. Does that refresh your recollection now, that she was injured?

A. Not on the slicer you indicated.

* * * * *

Q. (By Mr. Berke): What was she injured on?

A. On the chopper, chopper we refer to it.

Q. And where is the chopper located?

A. It is upstairs.

Q. Upstairs, whereabouts? [477]

A. We refer to it as upstairs.

Q. When you say "We refer to it," who do you mean, the employees? A. The employees, yes.

Q. Well, where was it upstairs?

A. When they are making applesauce, the apples go up an elevator to a belt, inspection belt there.

(Testimony of Orice Storey.)

Q. Well, is there another floor or something that you can refer to?

A. Well, it is elevated from the floor where I worked.

Q. How high up above the floor?

A. Oh, perhaps ten.

Q. Ten what? A. Ten feet. [478]

* * * * *

Q. (By Mr. Berke): Now, Mrs. Storey, you mentioned during the time you worked there on some occasions you saw dolls made [485] into apples—or, rather, apples made into dolls, is that correct? A. Yes.

Q. Now, were these apples made into dolls during working time? A. Yes.

Q. When did you see it—on more than one occasion? A. Yes.

Q. When was the first occasion that you saw it?

A. I don't recall the date.

Q. When was the second occasion?

A. I don't recall the date.

Q. When was the third occasion?

A. Various times, I don't recall the dates. [486]

* * * * *

Q. (By Mr. Berke): Now, do you know where these apples came from that were used to make these dolls? A. They were peeled apples.

Q. They were peeled; but where did they come from, do you know where the people got them from?

(Testimony of Orice Storey.)

A. The trimmers would pick them up off the bin in front of them.

Q. You saw them do that in each instance through all these weeks that you have testified about? A. No.

Q. So then you are assuming in large part that they got them from the bins, is that correct?

A. They would be there, yes.

Q. Again I ask, you are assuming that, are you not? A. Yes.

Q. Could those apples have been apples that were picked up off the floor by the employees who made them into dolls?

Mr. Magor: Just a moment. Objected to on the ground it asked for an opinion and conclusion of the witness, hypothetical.

Q. (By Mr. Berke): Well, if you know.

Trial Examiner: Well, there hasn't been any evidence that—well, I may be wrong. Overruled.

Mr. Berke: This is cross examination. [488]

Trial Examiner: Go ahead.

Mr. Berke: Do you want the question again?

The Witness: Yes, please.

Q. (By Mr. Berke): Do you know whether those apples were apples that were picked up off the floor by the employees who made them into dolls?

A. I'd say no.

Q. You'd say no. Is that because you know where they came from, you have personal knowledge? A. I didn't see them pick them up.

Q. Yes. So then again it is an assumption on

(Testimony of Orice Storey.)

your part that they were not picked up off the floor, isn't that correct? A. Yes. [489]

* * * * *

Recross Examination * * * * *

Q. (By Mr. Berke): Did I understand you to say, when the Trial Examiner asked you about that mouse you related, with reference to Mr. Bondi, that you didn't see the mouse?

A. I saw the mouse.

Q. Oh. When did you see it?

A. He picked it off the belt where I was sorting fruit, and put it in a tin can and walked over and put it in the flume. [504]

Q. It was a live mouse? A. Yes.

Q. That was on the belt? A. Yes.

Q. He hadn't put it on the belt, had he?

A. No, it came from a box of apples.

Q. In what? A. A box of apples.

Q. Oh, sometimes a mouse will come in with the apples that are brought in from the outside and dumped into the flume? A. Yes.

Q. That has been known to happen, hasn't it?

A. Yes.

Q. And that mouse, as far as you know, may have come from the orchard where the apple was picked and gotten into that box?

A. Yes. [505]

* * * * *

Q. (By Mr. Berke): You saw the apples here yesterday, did you not, that Mr. Martini had?

(Testimony of Orice Storey.)

A. Yes.

Q. And you saw one of them with two holes in it?

Trial Examiner: One vertical and one horizontal.

Mr. Berke: One vertical and one horizontal, almost at right angles to each other. [508]

* * * * *

Q. (By Mr. Berke): Did you see that apple yesterday? A. Yes.

Q. And you saw one of the two holes had a core inserted or plugged into it, did you not?

A. I was quite a ways away from it.

Q. But you did see it? A. Yes.

Q. Yes. Now, did you see an apple in that condition before yesterday?

A. I don't recall. [509]

* * * * *

EVA M. LEE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): Was there any meeting of the employees at which they were addressed by management at the time of the lay-off in 1953?

A. No.

Q. What shift was—well, strike that.

As far as you know, were the employees who were laid off chosen from one or both of the shifts then working up to that time?

(Testimony of Eva M. Lee.)

A. Well, most of the night shift was laid off and the day shift was kept on. [520]

* * * * *

Q. After you began working for the Respondent in 1954, did you sign a Union authorization card? A. I did.

Q. Do you remember the date?

A. No, I don't.

Q. Remember how long it was after you began work in 1954?

A. About four weeks, about a month. [522]

* * * * *

Q. Now, before you were laid off there on October 15th, did you hold any other position, other than peeler? A. Yes, I did.

Q. What position? A. Floorlady.

Q. And when were you made floorlady?

A. The morning of the 14th of October.

Q. And will you explain to the Examiner how that came about?

A. I was peeling and Steve Struempf came and asked me if I'd take over as floorlady.

Q. Who was Steve Struempf?

A. I wouldn't know. I thought he was the foreman, but I don't know.

Q. What made you think he was foreman?

A. Well, because he came and asked me if I thought—well, because I thought he was the foreman and I thought I should take orders from him, which I did.

Q. All right. Now, he came to you the morning

(Testimony of Eva M. Lee.)

of the 14th, you say? [523] A. Yes.

Q. And, to the best of your recollection, what did he say to you?

A. He asked me if I'd take the floorlady job, and I said I would, till they could get someone else, and I was wearing my Union button and I asked him if I could wear my button, and he said I could, he didn't care; and I said, well, what should I do, and he said, well, just take over, just like Edna did.

Q. Did he tell you at that time that there would be a lay-off the next day? A. He did not.

Q. Now, you say you were wearing your Union button? A. I was.

Q. Where did you get these buttons?

A. Got them at the Union Hall, Labor Temple.

Q. And when?

A. The night of the 13th of October. [524]

* * * * *

Mr. Karasick: I offer the button in evidence as General Counsel's Exhibit 31.

Trial Examiner: Any objection?

Mr. Berke: I object to it. It is irrelevant and immaterial in the light of the testimony.

Trial Examiner: I will receive it. Have a second one?

Mr. Karasick: I will have a duplicate.

(The object heretofore marked General Counsel's Exhibit No. 31 for identification was received in evidence.)

Q. (By Mr. Karasick): Now, had there been any other time before October 13th that the Union,

(Testimony of Eva M. Lee.)

to your knowledge, had handed [525] out buttons such as that to the employees at the plant?

A. No, there wasn't that I knew of, no.

Q. And when was it that button was handed out to you? A. The night of the 13th.

Q. Where?

A. At the Labor Temple in Santa Rosa.

Q. At what? A. Meeting.

Q. And was it handed out to the other employees at that meeting? A. Yes.

Q. Or were they handed out. On October the 15th, 1954, did you come to work as usual?

A. I did.

Q. Were you informed during the course of the day that there would be a meeting that day called by the Company? A. Yes, I was.

Q. Who informed you of the meeting?

A. Steve Struempf.

Q. What did he tell you?

A. Came around to me and told me to go tell the girls there would be a meeting across the street after work, and for us all to attend.

Q. And across the street, would you say where across the street? [526]

A. At the warehouse.

Q. What time of the day did he tell you about this?

A. Three, around three o'clock, approximately three o'clock.

Q. At that time did he tell you it would be a meeting regarding a lay-off? A. He did not.

(Testimony of Eva M. Lee.)

Q. At any time until you got into the meeting, did anyone from Management, prior to then, tell you there would be a lay-off that day?

A. No, they didn't.

Q. Now, did you go to the meeting?

A. Yes, I did.

Q. Did you inform the women under you to go?

A. I did.

Q. When you got there, who was there, with respect to Company representatives?

A. Mr. Bondi—

Q. That is Tony Bondi? A. Tony Bondi.

Q. And his position then was Chairman of the Board of Directors? A. I wouldn't know.

Q. I see. Very well. Who else?

A. Bill McGuire, Elmo Martini, and that's the only ones that I really knew. Ella Herrerias. [527]

Q. Ella was there? A. Yes.

Q. Do you know Mr. Duckworth?

A. Yes, I do.

Q. Was he there? A. Yes, he was.

Q. Now, as well as you can now recall, will you tell the Examiner what was said at that meeting.

A. Well, Mr. Bondi said that there was going to be a lay-off, he was sorry, but the warehouse was full, and he was going to have to cut down on help, and they was going to let some of us go.

Q. Do you recall anything else that was said at that time? A. No, I don't.

Q. Were the names of employees read?

A. Yes.

(Testimony of Eva M. Lee.)

Q. Now, this list of names that Mr. McGuire read, did they tell you what it would mean if your name was on the list?

A. He said if our names wasn't read, we'd known we was dismissed.

Q. Let's see if I understand; if your names were not read, you were being——

A. If the names were read, we'd be dismissed, we wouldn't have no more jobs.

Mr. Berke: Could I have that?

(Answer read.) [528]

Q. (By Mr. Karasick): Now, did Mr. Martini make any remarks at that meeting?

A. Yes, he did.

Q. Well, tell us what he said as well as you can now remember.

A. Well, he said he was sorry he had to let us go, it wasn't our work that wasn't satisfactory, and that he was letting us go according to seniority, and that he was sorry but he'd see us all next year, and he'd also see us at dinner, we were supposed to be invited too.

Q. Do you know what this dinner was?

A. Well, it was a dinner they have at the end of the season, every year.

Q. Had they had a dinner at the end of the season for the employees that worked there that season, in 1953? A. Yes.

Q. Now, do you know whether they had a dinner in '54 at the end of the season?

A. Yes, they did.

(Testimony of Eva M. Lee.)

Q. Were you invited?

A. No, I wasn't.

Q. Do you remember anything else said at that meeting, whether by Mr. Martini or anyone else?

A. No, I don't.

Q. Do you remember whether—in order to refresh your recollection, do you remember whether there was anything said about caps? [529]

A. Oh, yes, there was, they said that anybody that had caps——

Mr. Berke: Wait a minute. May we have who—"they"?

Trial Examiner: This is the same time.

Mr. Karasick: Let her finish, and I will get it for you, Counsel.

Trial Examiner: Is this Mr. Martini speaking now?

Mr. Karasick: I don't know, but I will find out as soon as she finishes. Let's have the statement and I will develop who it is, if she can recall.

The Witness: Mr. Martini said if there was any caps and aprons to turn them in at the office across the street.

Q. (By Mr. Karasick): Now, did you turn in your cap and apron? A. I did not.

Q. Why not?

A. Because they belonged to me.

Q. Now, the caps and aprons you refer to were different than yours in what respect?

A. They was the same thing, only I bought them the year before.

(Testimony of Eva M. Lee.)

Q. Well, what I mean is, did some of the employees put a deposit on the caps and aprons which the Company would let them use to work?

A. Yes.

Q. And then they would return them at the end of the season or whenever they quit work and get a deposit back, is that what you [530] are referring to? A. Yes, that's right.

Q. All right. Now, do you recall whether Mr. Martini read a letter at that time, at that meeting?

A. No, he did not read the letter, he didn't read the letter, Mr. Bondi read the letter.

Q. There was a letter read? A. Yes.

Q. Did you get a copy of the letter later?

A. In the mail, yes, with my check.

Mr. Karasick: Where is Martini's letter here?

Q. (By Mr. Karasick): I show you now, Mrs. Lee, General Counsel's Exhibit 25.

Mr. Berke: Before you go to that, what was her last answer? May I have it?

Trial Examiner: Read it.

(Answer read.)

Q. (By Mr. Karasick): I show you now, Mrs. Lee, General Counsel's Exhibit 25 and ask you to look at that letter and tell me if you can recall whether this is the letter that you referred to, that you received in the mail? A. It is.

Q. Has anyone——

Trial Examiner: Do you mind asking her the date she received it? [531]

(Testimony of Eva M. Lee.)

Mr. Karasick: Not at all. Would you answer the Examiner's question.

The Witness: Well, we were laid off on a Friday and the checks came the following Monday.

Q. (By Mr. Karasick): And the letter was with the check? A. Yes.

Q. Thank you. Had anyone in 1954 ever told you that Steve Struempf was a supervisor?

A. No.

Q. Did you apply for work at the Sebastopol Apple Growers Union this year?

A. Yes, I did.

Q. Did you go down and make out—fill out an application form? A. I did.

Q. I show you General Counsel's Exhibit 26 and ask you if that is the application form that you filled out when you went down there this year?

A. It is.

Q. When did you go, remember the date?

A. I went down the 13th of June.

Q. And you have not been recalled?

A. I have not.

Q. Do you know if they ever called some employees there at the plant, have you ever heard?

A. Yes, they have called some of them back, yes.

Q. And how do you know that?

A. Well, because the girls called me up and told me they were working.

Q. While you were employed there during the 1954 season, did you serve on any position or any committee for the Union? A. I did.

(Testimony of Eva M. Lee.)

Q. What committee?

A. I was just on the General Committee.

Q. General Committee; which shift?

A. The day.

Q. Can you remember some of the other employees there who served on the committee with you during the 1954 season? A. Yes.

Q. Would you name as many as you can recall now? A. Mary Russell.

Mr. Berke: Mary who?

The Witness: Mary Russell, Lila Layman, Beulah Lindley, Elsie Dickerson, Gloria Pate, Gloria Lindsey, Orice Storey, Clarence Storey, Leonard Lee. There was numerous others; I don't recall the names of the others.

Mr. Berke: I didn't hear that. I'm sorry.

The Witness: I said there were numerous others, that I don't recall their names.

Q. (By Mr. Karasick): What was the purpose of this committee on which you served? [533]

A. It tried to organize the Union, to get the Union into the canneries.

Q. By what means?

A. By going out and getting new members.

Q. I see. Now, while you also were employed, prior to the lay-off in 1954, did Ella Herrerias ever say anything to you about the Union? A. Yes.

Q. On one occasion or more than one occasion?

A. Two that I recall.

Q. Directing your attention to the first of these occasions, do you remember when that was?

(Testimony of Eva M. Lee.)

A. It was approximately three weeks before we were laid off.

Q. Do you remember where you were at the time? A. Yes.

Q. Where were you? A. In the plant.

Q. Can you remember the specific part of the plant?

A. Well, it was—well, down by where the time clocks was, where we—the benches that we sat on during recess.

Q. And was anyone else present besides you and Ella at the time?

A. Numerous—bunch of people, but I don't recall any of their names offhand. [534]

Q. Now, will you tell us at that time what Ella said in regard to that subject?

Mr. Berke: Well, just a moment. Can we have the whole conversation, who started it and so forth.

Mr. Karasick: Surely.

Q. (By Mr. Karasick): You tell us how the whole conversation started and who said what, to the extent you can remember it.

A. Well, we was all sitting there on boxes, and we was talking about the Union, and she says, "Don't get my girls all excited about the Union because," she says, "if you do," she says, "you are going to get black-balled from every job around here," she said, and she kept telling us not to talk about the Union, and she threatened us if we did we would be out of a job.

Mr. Berke: Wait a minute.

(Testimony of Eva M. Lee.)

Trial Examiner: Don't characterize, just say what she said.

Mr. Berke: Move that go out.

Trial Examiner: The words "she threatened us" may be stricken.

Mr. Karasick: All right.

Q. (By Mr. Karasick): Now, what the Examiner is directing your attention to is this, Mrs. Lee. You are to tell us only what she said. Now, did she say anything about being threatened, did she say anything about threats? A. No.

Q. All right. Do you remember anything else she said now, [535] other than this conversation you have given us about blackballing?

A. Yes, we'd lose our jobs, we'd all—we'd all be laid off if we didn't quit talking about the Union.

Q. She said that to you? A. She did.

Q. All right. Now, when was the second occasion in which Ella made reference to this subject?

A. That was several nights later, we was talking—

Q. Now, where were you at the time?

A. I was in the restroom.

Q. Now, was this during the day or at night?

A. It was in the daytime.

Q. When was the first occasion?

A. It was in the daytime, when we broke down, in the daytime, about four o'clock in the afternoon.

Q. About four o'clock? A. Yes.

(Testimony of Eva M. Lee.)

Q. Would that be toward the end of the shift then? A. Yes.

Q. All right. Now, to be sure we don't get confused, the four o'clock was which occasion, the first or second? A. The first one.

Q. The first? A. Yes. [536]

Q. Now, directing your attention to the second occasion, Mrs. Lee, about what time was that, do you recall?

A. It was just as we got through work, and I don't know whether it was five minutes to five—about five minutes to five.

Q. Do you remember?

A. Well, it was when the day shift went off work, and sometimes we went at four and sometimes at four-thirty.

Q. I see. All right. Now, on that occasion, where did you say you were? A. In the restroom.

Q. Were there other persons present besides you and Ella? A. Yes, there was.

Q. Do you know who they were?

A. No, I don't. They was coming and going all the time, so I don't recall who they were.

Q. I see. Now, as well as you can presently recall, will you tell us what the conversation was and who said what on that occasion?

A. Well, she says, if you girls don't quit talking about the Union, she says, and if the Union does get in here, she says, if you think I am tough, you wait till next year and I will show you how tough I can be.

(Testimony of Eva M. Lee.)

Q. Now, has the Company in 1953 and 1954 while you worked there followed a practice of selling its products to employees? [537] A. Yes.

Q. Have you ever bought any of the Company's products? A. I have.

Q. What have you bought?

A. I have bought applesauce and pie apples, both.

Q. Have you bought any that were made up during the 1954 season? A. Yes, I have.

Q. And in the 1953 season, too? A. Yes.

Q. Have you ever found any sort of imperfections in the pie apples or applesauce that you have used? A. I have.

Q. What have you found?

A. I have found a worm in the pie apples on several occasions, and I have found pieces of core and pieces of calyx in the applesauce many a time.

Q. What is calyx?

A. That is the blossom end of the apple.

Q. Have you ever found any seeds?

A. I have. [538]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): Now, Steve Struempf was a mechanic, was he not, as far as you knew?

A. As far as I know, yes.

Q. Yes, and that was his job, he repaired machines? A. Yes.

Q. And when was it you say that Steve

(Testimony of Eva M. Lee.)

Struempf came up to you and talked to you about you were going to be floorlady?

A. 14th of October.

Q. What time of the day was it?

A. Ten o'clock in the morning.

Q. And what were the words, as near as you recall?

A. He asked me if I would take over as floorlady. I said yes I would, till he could get someone else.

Q. Did he tell you that Mr. Duckworth sent him out there to ask you if you would?

A. No, he didn't. [542]

Q. Pardon me? A. No, he didn't.

Q. Do you know whether Mr. Duckworth sent him out? A. No, I don't.

Q. Now, it was you that brought the Union button to Mr. Struempf's attention, is that right, on that day?

A. I asked him if I could wear my Union button if I was floorlady.

Q. Yes, you were the one that mentioned it?

A. Absolutely.

Q. Yes, and his answer was what?

A. Do you want the words he said?

Q. Well, what was it he said?

A. He said, "I don't give a damn how many buttons you wear."

Q. Fine. He didn't tell you to take the button off, did he? A. He did not.

Q. Did Mrs. Herrerias tell you to take it off?

(Testimony of Eva M. Lee.)

A. She wasn't there.

Q. Mr. Duckworth tell you to take it off?

A. No, he didn't.

Q. Anyone representing management tell you to take the button off? A. No, they didn't.

Q. Anyone representing management come to you and ask you why you were wearing the button?

A. No, they didn't. [543]

Q. Now, you knew, did you not, Mrs. Lee, in 1954 there was a new manager at the head of the cannery? A. Yes, I did.

Q. And that was Mr. Martini?

A. Yes, sir. [544]

* * * * *

Q. (By Mr. Berke): At this meeting of the employees on October the 15th, Mr. Bondi, in his talk, you say, stated that he was sorry that there was going to have to be a lay-off? A. Yes.

Q. And he gave the reason why? A. Yes.

Q. What did he say, as near as you can recall?

A. Said the warehouse was full and they didn't —wasn't able to keep on, the apples were getting short, and there wasn't enough apples to keep two shifts going.

* * * * *

Q. Did anyone at that meeting say to the employees that worked on the night shift that they were not to complete the night shift?

A. No, they didn't.

Q. No one said that at that meeting while you were present? A. No, they didn't. [553]

(Testimony of Eva M. Lee.)

Q. And did anyone tell you to tell any of the employees at the meeting that they were not to complete their shift? A. No, they didn't.

Q. As far as you knew, the night shift was to complete the shift that night? A. That's right.

Q. Now, Mrs. Lee, I think you said that in 1953, when the Company went — or, reduced from two shifts to one shift, that most of the night shift was laid off? A. That's right.

Q. As far as you know then, some of the night shift did go on that single shift that worked after that? A. Very few.

Q. Well, whether few or not, as far as you know I am asking, some of the people that worked on the night shift did go on that single shift? A. Yes.

Q. That was in 1953? A. Yes. [554]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Karasick): You said you wore a Union button; where did you wear them?

A. On the lapel of my blouse, two of them.

Q. Were they in plain view or concealed?

A. They wasn't concealed by anything. [555]

* * * * *

Recross Examination

Q. (By Mr. Berke): Would you say that the people in 1953 who were on the night shift and went on this single shift were picked because they had been there long? A. Yes.

Q. Were you told that by management?

A. Yes.

(Testimony of Eva M. Lee.)

Q. Whom? A. Ella Herrerias.

Q. When did she tell you that?

A. When we were laid off.

Q. What did she tell you?

A. Well, she said there were going to be a few of them kept on because they had been there four years.

Q. She said there were a few going to be kept on?
A. Yes.

Q. Because they had been there how long?

A. Since the plant opened.

Q. No, what was the language you used before?

A. Well, it would have been four years last year.

Q. What was the language Mrs. Herrerias used to you, Mrs. Lee?

A. She said she was going to keep them on because they had seniority, they had been there since the plant opened.

Q. Didn't you say a moment ago she said they were going to keep them on because they had seniority, they'd been there four years? A. No.

Q. You say you didn't so testify?

A. I said that because—I was wrong, because they hadn't been there four years.

Q. And you may be wrong now about what you say Mrs. Herrerias said?

A. No, I am not wrong.

Mr. Berke: I have no further questions.

Mr. Karasick: That's all.

Trial Examiner: I have one. You say that if you were working longer than the regular quitting

(Testimony of Eva M. Lee.)

time, after the regular quitting time, because you started later in the morning, that the night shift had to stand around and wait during that time; where would the people on the night shift stand?

The Witness: Well, like the most of us, was outdoors, and some in the restrooms, in the two restrooms.

Trial Examiner: Did they use the benches at all?

The Witness: Yes, they did. [560]

Trial Examiner: Did they stand, in addition to sitting, around the benches?

The Witness: No, because they weren't supposed to stand around the machinery or anything. We were supposed to stay out of the way of all the machinery, and sit down on the bench, or others go in the restroom.

* * * * *

Further Recross Examination

Q. (By Mr. Berke): You say you weren't supposed to stand around because of the machinery; was that told to you? A. No.

Q. How do you know that?

A. Well, just because we knew better than that.

Q. Because it was a dangerous place to be when things were going, is that right?

A. Well, I imagine, yes. [561]

* * * * *

MARY RUSSELL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Magor): Miss Russell, were you ever employed by Sebastopol Apple Growers Union?

A. Yes.

Q. Do you recall when it was that you were first employed by that Company?

A. On or about July the 23rd or 24th.

Q. Of what year? A. Of '54.

Q. Of 1954. Was that the first time you were employed by the Company? A. Yes. [562]

* * * * *

Q. (By Mr. Magor): And when was it you first went to work, to the best of your recollection today, you first physically worked at the Company?

A. To the best of my recollection, it was the 23rd of July.

Q. What shift were you working on at that time? A. Night shift. [563]

Q. And, to the best of your recollection today, what hours were you working?

A. From four p.m., to 12:30, the best I can recall.

Q. Who was your floorlady at that time?

A. Ella Herrerias.

Q. What was the last day that you worked for the Company? A. October 15th, 1954.

(Testimony of Mary Russell.)

Q. How do you refer to the Company?

A. Sagu.

Q. Sagu. Did you sign any Union authorization card during the time that you were working for the Company? A. Yes.

Q. Do you recall when it was that you signed a card? A. On or about August the 10th.

Q. On or about August the 10th? A. Yes.

Q. Of what year? A. 1954.

Q. I show you General Counsel's Exhibit No. 28 in evidence, Miss Russell, and, overlooking the writing in ink on that card, is that card similar to the one that you signed? A. Similar, yes.

Q. What did you do with the card after you signed it?

A. I gave it back to Joy Bertolucci, from whom I obtained it.

Q. Who is she? [564]

A. Well, she was one of the girls passing out the cards for the Union.

Q. Where were you at the time that you obtained the card? A. Out in the parking lot.

Q. And what parking lot are you referring to?

A. Sagu's parking lot.

Q. Were you a member of any union committees? A. Yes.

Q. Do you recall when it was that you were on a union committee?

A. I can't remember exactly when I first went on it.

Q. How long was it after you were first em-

(Testimony of Mary Russell.)

ployed by the Company, to the best of your recollection; was it a week, two weeks, three weeks?

A. Well, it was longer than that when I went on the committee.

Q. You say you signed a card on or about August the 10th, 1954? A. That's right.

Q. How long was it after you signed a Union card, to the best of your recollection today?

A. I don't know for sure.

Q. You do know that you were on a union committee, is that right? A. Yes, sir, I do.

Q. That is, while you were working for the Company? [565] A. Pardon?

Q. That is, while you were working for the Company? A. Yes.

Q. Can you recall who the other members of the committee were?

A. Well, Eva Lee, Lila Layman, Orice Storey, Clarence Storey, Marjorie Byrd, Ruthie Deal and Lena Ameral.

Q. How do you spell Lena Ameral?

A. A-m-e-r-a-l. Nora Ames.

Q. Do you know whether or not—and I just want your own knowledge—whether that was the first union committee? A. Yes, it was.

Q. During the time that you were employed by Sagu, did you work on the night shift all the time?

A. No. About the 10th—from the 10th to the 13th of September I was on days, I transferred.

Q. You say it was about the 10th or the 13th of September that you transferred to day?

(Testimony of Mary Russell.)

A. The best I can remember.

Q. And from that date on, as best you can recall—either the 10th or the 13th of September—did you then work on days? A. Yes.

Q. —until you finally were laid off.

Trial Examiner: Before you go on, will you ask her whether the names she has given us referred to the day or the night committee or both. [566]

Q. (By Mr. Magor): Now, you have listed to the best of your recollection certain other employees who were on a union committee. Was that the day shift committee or the night shift committee; if you know, tell us; if not, say so.

A. Well, most of them were on the day shift committee, I mean from the day shift.

Q. Were you working on the day shift when you were on the union committee?

A. I can't remember.

Q. Did you at any time, while you were working for the Company, talk to Ella Herrerias, the floorlady, about the Union, or did she ever talk to you or in your presence about the Union?

A. Yes.

Q. Can you recall when that was, to the best of your knowledge?

A. Must have been in August sometime or the first part of September. I don't know exactly when.

Q. And what shift were you working at that time? A. The night shift.

Q. The night shift. What shift was Ella Herrerias the floorlady for? A. The night shift.

(Testimony of Mary Russell.)

Q. Where was it that this conversation occurred, physically in the plant, to the best of your recollection today?

A. Well, it was down where we were—where we went on breaks. [567]

Q. Please?

A. It was down in the plant, where we stood when we had our breaks.

Q. Where did you stand down in the plant when you had your breaks?

A. Well, they had some benches.

Q. Would you wait until this truck goes by. O.K.

A. There were some benches that were in front of the lounge, and the lounge was near the time clock.

Q. I see. Now, could you tell us to the best of your recollection who else was present, if anybody, at the time? A. Marcia Young—

Mr. Berke: What is the first name?

The Witness: Marcia.

Mr. Berke: Marcia?

The Witness: Yes. And Lea Richards.

Q. (By Mr. Magor): Do you recall anybody else as being present?

A. There were others around whose names I don't remember for sure.

Q. Did Ella Herrerias approach you, or did you approach Ella Herrerias, or what?

A. Well, what it was, she was trying to scare the girls—

(Testimony of Mary Russell.)

Mr. Berke: Just a moment. I move that be stricken.

Mr. Magor: That may go out. [568]

Q. (By Mr. Magor): Tell us what she did.

Trial Examiner: Strike it.

A. You want me to tell you in my words?

Q. (By Mr. Magor): That's right, tell us in your own words what she did, and what was said, and tell us what anybody else said at that time.

A. Well, I don't recall exactly how it started, but I do know that she said that if any of us talked union or signed pledge cards that we would immediately lose our jobs, and then she also said at the same time that if any of us attended union meetings there would be someone there from the company and that they would come back with our names from the union meeting, which would go to Mr. Martini and that we would lose our jobs.

Q. Do you know what else was said at that time, if anything?

A. I think that is about all she said at that time.

Q. Now, while you were working for the company—and when I say company I refer to Sagu, do you understand that? A. Yes.

Q. —did Mr. Martini talk to you about the union or did he talk about the union in your presence? A. Yes.

Q. Do you recall when that was?

A. It was on the day shift, about two weeks, I would say, before the lay-off.

(Testimony of Mary Russell.)

Q. Do you recall what time of day it was? [569]

A. In the morning, at break time.

Q. At break time? A. Yes.

Q. Do you recall what time of day break time was? As best as you can recall?

A. It started about 9:30 in the morning.

Q. Will you tell us now, Miss Russell, who else, if anybody, was present at the time?

A. Lila Layman.

Q. Was anybody else present besides Lila Layman?

A. Yes, there were three or four others I know, but I can't recall their names.

Q. Was Mr. Martini present? A. Yes.

Q. Was anybody else present with him?

A. I can't remember if there was anyone with him or not.

Q. Now, tell us what occurred at that time and tell us what was said and who said it.

A. Well, one of the girls—I can't recall for sure just which one—asked Mr. Martini why he wouldn't go union, and he said that he would shut the plant down definitely before going union, and he said, "I would not pay union wages."

Q. What else was said, if anything?

A. I believe that was all that was said.

Q. Now, did you talk to Mr. Martini after that, or prior to [570] that time, or at any time in your presence did Mr. Martini discuss the union?

A. Well, one time about three weeks before the lay-off he stopped Lila Layman and myself as we

(Testimony of Mary Russell.)

were coming back into the plant after lunch—we had been out to the union car—and he asked us if we were going steady with Charlie, one of the organizers, and we said yes, taking it as a joke when he said it, and he laughed and he said, well, he said, better be careful, and he said watch out, he's a tough character.

Q. And can you tell us who Charlie is?

A. Well, he's one of the union organizers.

Q. Do you know his last name?

A. Ciolina or something like that. I am not just definitely sure how you pronounce it.

Q. Where were you coming from at the time that you talked to Mr. Martini?

A. We were coming back from the union car, which was parked off the road, just before you get to the parking lot.

Q. You say off the road; is that at the Sagu plant? A. Yes.

Q. And where was Mr. Martini when you talked to him?

A. He was standing just outside the plant door.

Q. Was anybody with Mr. Martini at the time?

A. Yes, but I don't recall who.

Q. Is he present in the hearing—was he present in the hearing room at all today? A. No.

Q. What was your purpose in going out to the car where the organizers were?

A. Find out more about the union.

Q. Was any other union organizer out there besides Charlie Ciolina, if you know?

(Testimony of Mary Russell.)

A. Yes; his first name is Jack, but I can't recall his last name.

Q. Will you tell us what time of day this was?

A. Noon.

Q. Was it during the lunch period?

A. Yes.

Q. Now, before—after that, or at any other time, did Mr. Martini discuss the union with you, or did he say anything about the union in your presence?

A. Well, various other times I have heard him make the same remarks that he had made before about shutting the plant down before going union.

Q. Do you recall when these various other times were, to the best of your recollection today?

A. Not exactly; it would be from about the two week period on up until the lay-off, throughout that period.

Q. That would be two weeks from the time of the lay-off, up until the time of the lay-off, is that it? [572]

A. Yes, two weeks before the lay-off up till the time of the lay-off.

Q. Do you recall what time of day it was that Mr. Martini said that, to the best of your recollection today?

A. No, I can't recall the time.

Q. Do you recall who else, if anybody, was present at the time?

A. All I know, I can remember, is that there was groups of people there, but what their names were, I can't remember.

(Testimony of Mary Russell.)

Q. Was anybody with you at the time?

A. That one time I know Lila Layman was with me. The other times I'm not sure who.

Q. What was the last day on which you worked for the company? A. October 15th, '54.

Q. What occurred on that—— Strike that.

Was there a meeting held on October 15th, 1954?

A. Yes.

Q. And were employees named who were to be retained and those who were not to come to work?

Mr. Berke: Just a moment. I move to strike that on the ground that the question is leading and suggestive.

Mr. Magor: I withdraw the question.

Q. (By Mr. Magor): Why didn't you return to work on the following working day after October 15th? A. Because I was laid off. [573]

Q. I see. I show you General Counsel's Exhibit 31 in evidence, Miss Russell, and I ask you if you have ever seen a button similar to that before?

A. Yes, I have.

Q. Did you ever have one?

A. Yes, I wore a couple of them.

Q. You wore a couple of them? A. Yes.

Q. Where did you wear them?

A. On the collars or lapels of my shirt.

Q. Were the collars and lapels of your shirt outside any outer garment?

A. Yes, outside of the apron.

Q. The button was in plain sight, is that it?

A. Right.

(Testimony of Mary Russell.)

Q. Did you wear it at work? A. Yes, I did.

Q. Do you recall when it was that you received a union button?

A. I received it at a committee meeting, the night of the 13th, and I wore it the 14th and the 15th.

Q. And are you referring to the month of October? A. October, excuse me.

Q. And did you observe the other employees on the day shift on October 14th and 15th, 1954?

A. Yes. [574]

Q. What, if anything, did you observe about those employees?

A. I noticed that almost all of them were wearing the same buttons that I was wearing.

Q. And you are referring, are you not, to——

A. To the day shift. [575]

* * * * *

Q. All right. Now, after the election, after the lay-off of October 15th, 1954, at any time after that did you go out to the company?

A. Would you ask that again, please?

Q. Yes, I will. After you were laid off on October the 15th, 1954, after that date did you at any time go out to the company and talk to any representative of management? A. Yes.

Q. Can you tell us when it was, to the best of your recollection?

A. Well, it was about two weeks later, on a Monday morning.

(Testimony of Mary Russell.)

Q. And can you tell us about what time of day it was?

A. Approximately around ten in the morning.

Q. Will you tell us who was with you, if anybody?

A. Lila Layman. [577]

Q. Will you tell us who you saw, what representative of the company?

A. Yes, we spoke with Mr. Martini.

Q. And where were you talking to Mr. Martini?

A. In the warehouse.

Q. Was anybody else present with him at the time?

A. Not at that time we spoke to him, no.

Q. Now, will you tell us to the best of your recollection today what was said and who said it.

A. Well, we walked up, both of us, telling him that we were looking for work, and wondering if they needed any help, and he said, at that particular time no, but they would later on, and he also told us that he would hire back the girls that had been laid off before putting on new help; and he, at the same time, made the remark that the unions were no good anywhere in the United States as far as canneries were concerned, but if it would have been a big industry such as the automobile industry it would be fine; and he also said that we should have thought it over seriously before jumping into this union deal, and we told him—or, Lila Layman told him that we had.

Q. What did he say to that, if anything?

A. I don't recall him saying anything to that.

(Testimony of Mary Russell.)

He had also at the same time asked us what our addresses were, and we told him, and he asked about our phone numbers and we told him that he had that in the office, and he said all right. [578]

Q. What, if anything else, was said?

A. And that's about all, to the best of my knowledge.

Q. Did you ever receive a call from the Company to go back to work? A. No, I did not.

Q. Directing your attention to the season of 1955— Strike that.

Since that time, have you ever gone out and looked for work at Sebastopol Apple Growers Union?

A. Yes, I have.

Q. When was that? A. That was—

Q. As best you can recall.

A. During the month of June, '55.

Q. Did you see— Strike that.

Do you recall when it was in June, 1955, that you went out, what day?

A. Not exactly, but I would say it was somewhere around the 15th, or perhaps a few days later.

Q. Was anybody with you at the time?

A. Yes.

Q. Who was with you?

A. Oh, Eva Lee and Lila Layman, Nora Ames, Valerie Cuttress, I believe the name is.

Trial Examiner: How do you spell that? [579]

The Witness: Valerie? [580]

* * * * *

(Testimony of Mary Russell.)

Mr. Karasick: Mr. Examiner, as the result of an off-the-record discussion, Counsel for the General Counsel and Counsel for the Respondent hereby stipulate and agree with respect to the following dates concerning the Representation case which is part of this consolidated proceedings, known on the Official Docket of the Board as 20-RC-2367; with respect to that matter, it is hereby stipulated that the Petition was filed by the Union in this case on August 17th, 1954, hearing was held with respect to that Petition on September 19th, 1954; the Board issued its decision and direction of election on October 4th, 1954, and the election was conducted on October 19th, 1954.

Is that a correct statement, and does Counsel so stipulate?

Mr. Berke: So stipulated.

* * * * *

Cross Examination—(Resumed)

Q. (By Mr. Berke): Miss Russell, you first went to work for Sagu last year on either July 23rd or July 24th? A. Yes. [586]

Q. And that was the first time you ever worked for the Company? A. That's correct.

Q. The cannery was in full operation at the time you went to work, was it not? A. Yes.

Q. Now, you worked for a period of time on the night shift, is that right? A. Yes.

Q. For how long, do you know?

A. Oh, from the time I started until about the 10th—from the 10th to the 13th of September.

(Testimony of Mary Russell.)

Q. You mean from about July 23rd or 24th to September 10th or 13th? A. That's right.

Q. And then you transferred, at your request, to the day shift? A. That's correct.

Q. And was this request to transfer to the day shift because you didn't like Mrs. Herrerias, the floorlady on the night shift?

Mr. Magor: Objected to on the ground it is immaterial.

Trial Examiner: Well, I don't know.

Mr. Berke: Bias and prejudice.

Trial Examiner: I will hear it. [587]

A. Well, that was one reason.

Q. (By Mr. Berke): Yes. And you worked on the day shift until October the 15th? A. Yes.

Q. When there was a change from two shifts to one shift? A. That is correct.

Q. Now, as I understand it, there was a conversation some time when you had your break, and this took place near the benches in front of the lounge? A. That's right.

Q. Do you know when that conversation took place?

A. I can't recall what night it was.

Q. It was while you were on the day or night shift? A. The night shift.

Q. And, as I understand it, you don't recall how that conversation started? A. No, I don't.

Q. You don't recall whether somebody asked a question of Mrs. Herrerias or just how it got started? A. No. [588]

* * * * *

ERMA BATE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): Mrs. Bate, did you, last season, work for Sebastopol Apple Growers Union?

A. Yes.

Q. Do you remember when you began work there? A. In July.

Q. And what was your job? A. Sorter.

Q. On what shift? A. The night shift.

Q. And who was your floorlady?

A. Ella Herrerias.

Q. After you came to work at the Company, did you sign a Union authorization card? A. Yes.

Q. Do you remember when you signed it?

A. In August. [597]

* * * * *

Q. (By Mr. Karasick): Except for the matter which appears on that card in ink, was the card you signed the same as the card I show you as General Counsel's Exhibit 28? A. Yes.

Q. Now, do you remember, were you at the plant at the time there was a lay-off of employees and reduction to one shift, on October 15th, 1954?

A. Yes.

Q. Did you attend a Union meeting shortly prior to that date? A. Yes.

Q. Do you remember the date of the meeting?

(Testimony of Erma Bate.)

A. October the 13th.

Q. At that meeting did you see a list of Union members who were employees of the Sebastopol Apple Growers Union? A. Yes.

Q. Did you secure a copy of that list?

A. Yes.

Q. In what manner?

A. I walked up to the desk and took it.

Q. Did anyone see you take it, as far as you know? A. No.

Q. What did you do with it after you took it?

A. I put it in the car.

Mr. Berke: She what? [598]

Mr. Karasick: She put it in the car.

Q. (By Mr. Karasick): In your car?

A. Yes.

Q. What part of the car?

A. In the glove compartment.

Q. Now, after that, did you give the list to anyone? A. Yes.

Q. To whom? A. Ella Herrerias.

Q. When did you give it to her?

A. The night of the 14th. [599]

* * * * *

Q. (By Mr. Karasick): Now, you say you gave this list to Mrs. Herrerias on the night of the 14th?

A. Yes.

Q. Do you remember about the time of day it was, or night? A. I think around 8:30.

Q. Where were you at the time?

A. On the belt.

(Testimony of Erma Bate.)

Q. And was anyone else present, immediately present, that could overhead the conversation?

A. No.

Q. Did Ella Herrerias come up to you, or did you come up to her? A. She came up to me.

Q. What did she say?

A. She wanted to know what was new and if I heard anything.

Q. What, if anything, did you say?

A. I told her I had something for her.

Q. All right. What happened then, what was said or done?

A. She said, "Good." I said it was in the car, I would get it for her.

Q. Now, where was your car?

A. Across the railroad tracks, by Mr. Martini's office.

Q. And what did you do then? Did you go over to the car and get it? A. I did. [600]

Q. And did she come with you? A. No.

Q. I see. Where was she?

A. She waited around the belt.

Q. Did you come back?

A. Did I—Pardon me?

Q. Did you come back to the belt then with the list? A. Part way to the belt.

Q. Then what happened?

A. I gave it to her.

Q. Now where was she when you gave it to her?

A. Standing by some boxes.

Q. Was anyone else present? A. No.

(Testimony of Erma Bate.)

Q. Did she say anything to you when you gave her this list? A. Yes.

Q. What did she say?

A. She said, "Thanks very much." She said, "I can't tell you how much I appreciate this, and Mr. Martini."

Q. Now, at the meeting—Strike that.

I hand you General Counsel's Exhibit 31 and ask you if you have ever seen a button like that before?

A. Yes.

Q. Did you have such a button, or get one?

A. Yes. [601]

Q. When? A. At the Union meeting.

Q. What date, do you remember?

A. October 13th.

Q. This same meeting you are talking about?

A. Yes.

Q. Did you wear the button? A. No.

Q. What did you do with it after you got it?

A. I left it home.

Q. Now, during the time that you worked there last season, did Ella ever talk to you about the co-op cannery? A. She did.

Q. Do you remember when that was?

A. About a week or ten days before the lay-off.

Q. And where were you at the time?

A. On the belt.

Q. Anyone else present? A. Yes.

Q. Who? A. Ernestine Hack.

Q. And who was she?

(Testimony of Erma Bate.)

A. She is a sorter across from me.

Q. Same job you had? A. Yes. [602]

Q. And was she working across this belt?

A. Yes.

Q. Is it a moving belt? A. Yes.

Q. What was it that Ella said to you at that time?

A. She said, "If this place goes Union, we are going to close it down, already six weeks of apples went to the co-op cannery on account of the Union."

Q. Now, did Ella ever talk to you about any list of people? A. Yes.

Q. Do you remember when that was?

A. A few days before the lay-off.

Q. And where were you at that time?

A. On the belt.

Q. Anyone else present? A. Yes.

Q. Who? A. Ernestine Hack.

Q. What did Ella say to you at that time?

A. She said that she was making up a list, and that all the ones which would stick with her would be assured of a job, otherwise they would be black-balled from here down south.

Trial Examiner: Will you read me that answer.

* * * * *

Q. (By Mr. Karasick): Now, did you attend the meeting at which the names—Strike that.

Did you attend the meeting at which—in the warehouse on [607] October 15th, 1954, during which the Company announced that it was laying

(Testimony of Erma Bate.)

off employees and would reduce operations to one shift? A. Yes.

Q. Was there a list of names read at that meeting? A. Yes.

Q. Was your name read on the list?

A. No—I—no.

Q. Did you listen for it? A. Yes.

Q. Carefully? A. Very carefully.

Q. And it was not read? A. No.

Q. What did that mean, when your name wasn't read?

A. It meant I wasn't to perform work.

Q. It meant you were laid off? A. Yes.

Q. Now, what—was this meeting shortly after you came to work that night, the meeting in the warehouse was shortly after you punched in?

A. Yes.

Q. After the meeting was over, what did you do?

A. I went home.

Q. After you got home, did you receive any—well, what [608] happened after you got home?

A. Shortly after I got home I received a telephone call. [609]

* * * * *

Q. (By Mr. Karasick): Now, the next day did you receive any more phone calls through this same connection? A. Yes.

Q. When was it the next day?

A. About 8:30 in the morning. [611]

Q. Who called then?

(Testimony of Erma Bate.)

A. Ernestine Hack brought over a note from Ella, saying I was to call her.

Q. Now, this note was what, what did it consist of?

A. It gave Ella Herrerias' telephone number on a little pink slip of paper.

Q. And was her name on the paper, or just the telephone number?

A. Her name and telephone number.

Q. And what did Ernestine tell you about that?

A. Ernestine told me that Ella was very worried about me and wanted me to phone as soon as possible.

Q. Did you phone Ella Herrerias then?

A. I did.

Q. Did you reach her? A. Yes.

Q. Will you tell us what the conversation was between you? A. Yes.

Q. What did you say and what did she say?

A. She said, "Oh, I'm so worried about you; why didn't you come to me and see when your name—when you thought your name wasn't on that list?" and she said, "Well, you come up to the house and see me," and I did, I went up there.

Q. Now, how much later?

A. Within an hour. [612]

Q. Was anyone else present when you saw Ella at her house then? A. No.

Q. Will you tell us what the conversation was between the two of you on that occasion?

A. Ella said, "Why didn't you—why didn't you

(Testimony of Erma Bate.)

come to the office?" She said, "I was so worried about you, your name was on the list," and she said, "Did you know you could get me into an awful lot of trouble if you wanted to, because I confided in you an awful lot."

Q. Do you recall anything else she said on this occasion? A. Yes, I do.

Q. Would you relate it, please?

A. She said that Mr. Martini did not trust me because my husband was such a strong Union man, but she would fix this up so that I could go back to work.

Q. Did she ask you to go back to work?

A. Yes, she did.

Q. Did she tell you when? A. Yes.

Q. When did she tell you to go back?

A. Monday.

Q. Did you go back the following Monday?

A. I did.

Q. That is October 18th, 1954? [613]

A. Yes, yes.

Q. Were you put back to work?

Mr. Berke: October when?

Mr. Karasick: 18th, 1954.

Q. (By Mr. Karasick): Were you put back to work? A. Yes.

Q. Who put you back to work?

A. Ella Herrerias.

Q. What job, same job you had before?

A. Yes.

(Testimony of Erma Bate.)

Q. Did you continue to work for the balance of that season? A. Yes.

Q. As far as you know, were there any members of the Union still working in the plant after the lay-off of October 15th, 1954?

A. Yes, there was. [614]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): At one time you and Mrs. Herrerias were good friends, were you not?

A. Yes.

Q. And you and Mrs. Herrerias some months ago had quite an argument, did you not?

A. No.

Q. And Mrs. Herrerias accused you of making false statements about her and not being a true friend? A. No.

Q. You are still her friend?

A. I haven't seen her.

Q. No, but how long has it been since you haven't seen her? A. Oh, I don't remember.

Q. I see. You were friends, besides being a co-employee, were you not? A. Pardon me?

Mr. Berke: Do you want to read it to her?

(Question read.)

Q. (By Mr. Berke): Besides being a co-worker, you were a good friend of hers?

A. I wouldn't say a good friend, no.

Q. No? You aren't today, are you?

Mr. Karasick: Well, I submit, Mr. Examiner, I know the purpose of this, and I think Counsel

(Testimony of Erma Bate.)

should have broad lee-way; asking this witness' opinion on the strength of the friendship or whether you are a good friend or not is a distinction of such nicety I think it is objectionable.

Trial Examiner: Well, I will allow it.

Mr. Karasick: All right. Do you remember the question?

The Witness: Will you repeat it, please.

Mr. Berke: Will you read it, Mr. Reporter.

(Question read.)

Trial Examiner: Do you understand the question?

The Witness: Yes, I do.

Trial Examiner: Will you answer it.

The Witness: I don't see how I am going to answer that question.

Q. (By Mr. Berke): Do you mean you can't or you don't want to?

Mr. Karasick: If you know the answer to the question, answer it, Mrs. Bate.

The Witness: I don't know the answer. [619]

* * * * *

Q. (By Mr. Berke): You had been to Mrs. Herrerias' house a number of times before October 15th, had you not? A. No.

Q. You had not? A. No.

Q. Had you been there once before October 15th? A. No.

Q. Never been there before that date?

A. Not that I recall. [625]

* * * * *

(Testimony of Erma Bate.)

Q. Mrs. Bate, Mr. Grami—You know who he is, don't you? A. Yes.

Q. He is one of the representatives of Local 980? A. Yes.

Q. Did Mr. Grami have a talk with you about that list? A. No.

Q. Didn't Mr. Grami ask you about your taking that list and what you had done with it?

A. Yes.

* * * * *

Q. All right. And didn't you at that time, when you were talking with Mr. Grami about the list, deny that you had given Mrs. Herrerias the list?

A. Yes.

Q. Were you telling Mr. Grami the truth at the time?

* * * * *

Q. (By Mr. Berke): When was it you had this conversation with Mr. Grami?

A. I don't remember.

Q. Sometime after October the 15th, was it?

A. I don't remember. [628]

* * * * *

Trial Examiner: Now, you were asked on cross examination if you gave the list to Mrs. Herrerias at that time and——

Mr. Karasick: At what time, Mr. Examiner?

Trial Examiner: At the time when she went to Mrs. Herrerias' house, on October 16th, the day after the lay-off.

Mr. Karasick: Oh.

(Testimony of Erma Bate.)

Trial Examiner: And your answer was you did not?

The Witness: Correct.

Trial Examiner: Then you said you didn't recall being at Mrs. Herrerias' house on October 16th. Do you have any explanation?

The Witness: Yes, I can't recall all those dates, but I was at her house October the 16th. [635]

* * * * *

ERNESTINE HACK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [640]

* * * * *

Q. (By Mr. Karasick): Mrs. Hack, did you work last year at Sebastopol Apple Growers Union?

A. Yes.

Q. Do you recall when you began work there?

A. July the 19th, 1954.

Q. And what was your job?

A. Sorting apples.

Q. And what shift? A. Night shift.

Q. Who was your floor lady? A. Ella.

Q. Ella Herrerias?

A. Herrerias, yes.

Q. After you came to work for the Company, did you sign a Union authorization card?

A. Yes, I did.

Q. Except for the matter on the card which is written in ink, was the authorization card you

(Testimony of Ernestine Hack.)

signed identical with General Counsel's Exhibit 28, which I now show you? A. Yes.

Q. Do you remember the date you signed that card? A. August 10th. [641]

Q. After you came to work at the Company, do you remember a time, any time when Ella Herrerias talked to you about the co-op cannery?

A. Yes.

Q. Do you remember about when that was?

A. It was in October, about a week before the meeting.

Q. And is the meeting you are referring to the meeting of October 15th, 1954, of the lay-off, when the employees were notified there was a lay-off?

A. Yes.

Q. Where were you at the time?

A. The belt.

Q. Anyone else there too?

A. The workers.

Q. Besides you and Ella, was anyone else—was your partner on the belt at that time?

A. Yes.

Q. Who was that? A. Erma Bate.

Q. Will you tell us now, as well as you can recall, what Ella Herrerias said to you about the co-op on that occasion?

A. Well, she said we lost six weeks of apples to the co-op and if the place went Union we'd close down. [642]

* * * * *

Q. On any other occasions in addition to the one

(Testimony of Ernestine Hack.)

I have asked you about, while you were working there last season, did Ella talk—make any statements about the Union that you can recall?

A. Yes. [645]

* * * * *

Q. (By Mr. Karasick): All right. Now, with the earliest point of time that you can remember, with the statement in mind that you have, when was the earliest of these statements in terms of the time you came to work there? A. In September.

Q. Can you establish a date any closer than that, latter half or middle?

A. Well, about the middle of September.

Q. About the middle of September. Where were you at the time? A. The belt.

Q. Same place? A. Yes.

Q. Was Erma present on that occasion?

A. Yes.

Q. Anyone else, to your knowledge?

A. No.

Q. What were the statements made by Mrs. Herrias on that occasion?

Mr. Berke: I am going to object to that. Let's get the conversation.

Mr. Karasick: Very well, Counsel. [646]

Q. (By Mr. Karasick): What was the conversation, as well as you can recall it?

A. Well, anybody that joined the Union would be black-balled all the way down the line.

Q. This is what Ella said? A. Yes.

* * * * *

No. 16117

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NATIONAL LABOR RELATIONS BOARD,
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SEBASTOPOL APPLE GROWERS UNION,
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Transcript of Record

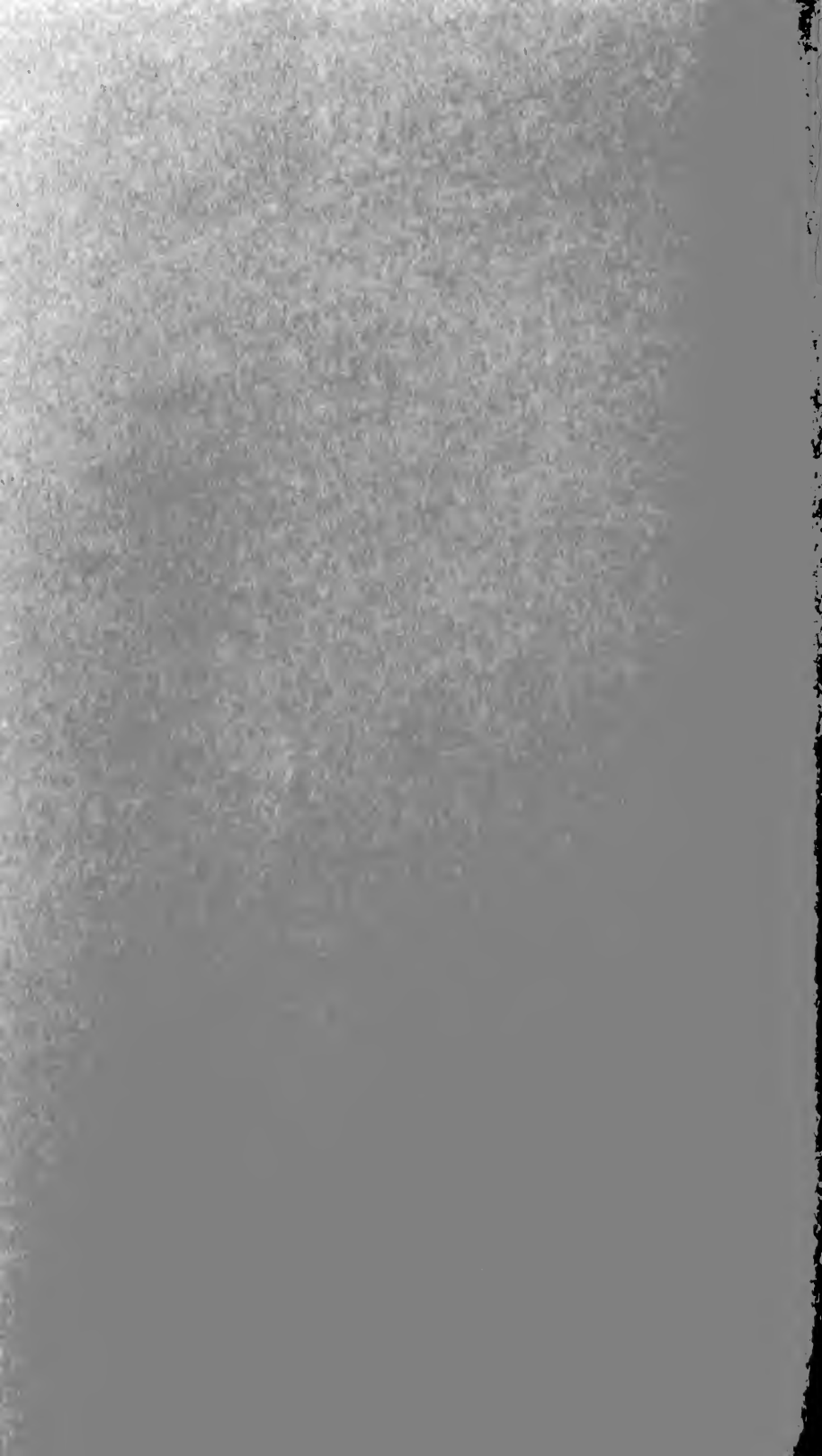
In Three Volumes

VOLUME II.

(Pages 433 to 876, inclusive)

Petition For Enforcement of An Order of
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FILED
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PAUL P. O'BRIEN, CLERK



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(Testimony of Ernestine Hack.)

Q. Now, do you remember any other statements she made about the Union during last year's season? A. No. [647]

Q. Did you go to work on the night of October 15th, 1954; did you punch in? A. Yes.

Q. And was there a meeting held in the warehouse that night? A. Yes.

Q. Did you—Who told you about that meeting?

A. Well, a lot of the workers, and it was on the board.

Q. Was your name read from the list of employees that was read? A. Yes.

Q. Was Erma Bate's name read?

A. I didn't hear it.

Q. Did you listen carefully for her name as well as yours? A. Yes, I did.

Q. And you didn't hear it read? A. No.

Q. After the meeting was over, did you go back to work? A. Yes.

Q. After you had gone back to work, did Ella Herrerias come and talk to you? A. Yes.

Q. About how long after you got back to work?

A. About an hour.

Q. And was anyone else present at the time?

A. Well, the workers, the men.

Q. The dumpers and stackers around? [648]

A. Yes.

Q. But anyone immediately present at the conversation? A. No.

Q. Will you tell us as well as you now can recall what you said and she said on this occasion?

(Testimony of Ernestine Hack.)

A. Well, she came out and wanted to know where Erma was and I said, "I don't know, she took off," and some man spoke up and said——

Mr. Berke: Wait a minute. That's outside——

Trial Examiner: Wait.

Mr. Karasick: All right.

Q. (By Mr. Karasick): I think you can go on now, if you will.

A. She came out to the belt and asked where Erma was, and I says, well, I think she took off, and some man spoke up and said she did, he seen her leave; and she asked me where she went, and I said she was mad because her name wasn't called. So she says, well, I know it was called, because I asked for her, and so then she said she was going to the office; she went, came back in about a half hour or so and showed me her name was on the list.

Q. She showed you a list on which Erma's name was listed? A. Yes. [649]

* * * * *

Cross Examination

Q. (By Mr. Berke): Mrs. Hack, you say that you went to work for Sagu the first time on July 19th, 1954? A. Yes.

Q. And that was on the night shift?

A. Yes.

Q. You are certain of that date, are you? [658]

A. Yes, yes.

Q. Are you as certain of the conversation that you have related that took place between Mrs. Bate and Mrs. Herrerias and yourself, at which

(Testimony of Ernestine Hack.)

you listened or heard, as you are of the date you went to work? A. Yes.

* * * * *

Q. (By Mr. Berke): Do you recall how many conversations Mrs. Herrerias had with Mrs. Bate while you were present? A. No.

Q. Was there more than one?

A. I really didn't pay any attention. [659]

* * * * *

Q. As I understand it, you saw Mrs. Bate's name on the list of employees that were to be retained on the single shift, is that correct? [660]

* * * * *

A. Yes.

Q. (By Mr. Berke): Mrs. Herrerias showed you that list on the night of October 15th, is that right? A. Yes. [661]

* * * * *

Q. (By Mr. Berke): Are you and Mrs. Bate friends, besides being co-workers? A. Yes.

Q. You visit at each other's home?

A. Yes.

Q. Have you talked this matter over between you? A. No.

Q. Not at all? A. No.

Q. You didn't discuss whether there was going to be a hearing involving the Company that you worked for? A. No.

Q. And you discussed nothing about Ella Herrerias and what she was supposed to have said to you and to Mrs. Bate? A. No.

(Testimony of Ernestine Hack.)

Q. Didn't discuss this with anyone?

A. No.

Q. Not even with representatives of the National Labor Relations Board? A. Well, yes.

* * * * * [663]

LILA MAE LAYMAN

called as a witness by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [667]

Direct Examination

* * * * *

Q. (By Mr. Magor): During the time that you were working for Sagu or Molino, did you sign any Union authorization card? A. Yes.

Q. Do you recall when it was, to the best of your recollection?

A. All I can tell you is that it was some time in August.

Q. Can you tell us how long it was after you were first employed that you signed one?

A. I would say approximately two weeks.

Q. I show you, Mrs. Layman, General Counsel's Exhibit No. 28 in evidence and I ask you to look at that very carefully. Now, [669] overlooking the writing on General Counsel's Exhibit 28, which is put in there by pen, is this similar to the card that you signed? A. Yes.

Q. What did you do with the card that you signed, Mrs. Layman? A. I mailed it in.

Q. And you mailed it in to whom?

(Testimony of Lila Mae Layman.)

A. The Union.

Q. The Teamsters, Local 980? A. Yes.

Q. What union activities, if any, did you engage in while you were employed by Sagu or Molino?

A. Well, I helped the girls, I tried to get some of the girls to sign pledge cards.

Q. And when you refer to pledge cards, are you referring to General Counsel's Exhibit 28?

A. Yes.

Q. And when was that, that you did that?

A. All the time I was working at Molino.

Q. And——

Trial Examiner: Excuse me. Do you mean that literally?

The Witness: Well, no, wait a minute. I mean while—not while I—not while I was on the job, but before I went to work, during my lunch hour.

Trial Examiner: I am talking about before you yourself became interested in the Union.

The Witness: I was interested in the Union.

Trial Examiner: From the day you were hired?

The Witness: Yes.

Trial Examiner: I see. All right. I was just wondering why the delay in signing that pledge card.

Q. (By Mr. Magor): Were you on any Union committees? A. Yes.

Q. And do you recall what Union committees you were on, or committee?

(Testimony of Lila Mae Layman.)

A. I don't quite understand what you mean by that.

Q. Well, let's get at it this way: When were you on a Union committee, to the best of your recollection, how long after you went to work there?

A. Shortly after I signed the pledge card.

Q. When you say shortly after, would it have been a matter of days or a week or what?

A. I can't remember how long it was after, but it was only—I'd say not over a week or so at the most.

Q. And who asked you to be on the Union committee? A. Bill Grami.

Q. And who is Bill Grami, to your knowledge?

A. He is the organizer in the Sebastopol area.

Q. Where were you at the time that Bill Grami asked you to be [671] on the Union committee?

A. On my way home from work.

Q. And was this the day shift or night shift committee, if you know? A. Day shift.

Q. To your knowledge, was it the original committee? A. Yes.

Q. Can you tell us to the best of your recollection today who the other members of the committee were?

A. Mr. and Mrs. Storey, Mr. and Mrs. Lee, Mary Russell, Leonor Johnson, Lena Ameral and myself. There were more but I——

Q. You don't recall the names? A. No.

Q. What are the first names, if you know, of

(Testimony of Lila Mae Layman.)

Mr. and Mrs. Storey? Do you know their first names? A. Yes.

Q. Will you give them to us, please?

A. Orice Storey and Clarence Storey.

Q. Now, do you know the first names of Mr. and Mrs. Lee? A. Yes.

Q. Will you give them to us, please?

A. Eva Lee and Leonard Lee.

Q. Now, did you know Mrs. Storey when she was working at the cannery? [672] A. Yes.

Q. Did you know that she was discharged?

A. Yes.

Q. Before she was discharged, was there an incident involving a group of women wanting to talk to Mr. Martini? A. Yes, there was.

Q. Do you recall when that was?

A. I don't recall the date, no.

Q. Do you recall how long it was before Mrs. Storey was discharged?

A. Couldn't have been over three or four days, I don't think; I'm not sure.

Q. That is the best of your recollection?

A. Yes.

Q. Will you tell us what occurred on that date, to the best of your recollection?

A. The Union organizers were out on the highway talking over the loudspeaker.

Q. Do you know who the Union organizers were at that time? A. Yes.

Q. Who were they?

(Testimony of Lila Mae Layman.)

A. Bill Grami, Charlie—here we go again—Ciolino or something.

Q. Is it Charlie Ciolino? A. Yes. [673]

Q. And where on the highway were they?

A. Well, they were parked out in front of the plant on the highway.

Q. To the best of your recollection, where were you at the time? A. Talking to them.

Q. And what time of day was it, to the best of your recollection, Mrs. Layman?

A. It was during our lunch hour.

Q. And tell us what occurred.

A. Well, we were asked to go in and ask Mr. Martini if he would consent to meeting with the committee and the organizers, and have a talk with us, to find out if he would consent to us having an election at the plant.

Q. So what did you do then, if anything?

A. We went back in.

Q. When you say "we," who are you referring to?

A. Well, we decided—Mary Russell and Orice Storey and myself.

Q. Tell us what you did.

A. We decided that it would be best not to go in by ourselves, so we stopped and asked some of the other women if they would go with us.

Q. Do you recall who the other women were?

A. Everyone that worked there. [674]

Q. And was this during the lunch hour?

A. Yes.

(Testimony of Lila Mae Layman.)

Q. Tell us what happened, and what did you do then?

A. We got inside the plant and I went up and knocked on the door of Mr. Martini's office, and Mr. Duckworth came out and said that Mr. Martini was busy, that he wouldn't talk to us right now.

Q. When you went up and knocked on the door, what door are you referring to?

A. Mr. Martini's office.

Q. And where is that located?

A. It is upstairs by the lab.

Q. And who is Leonard Duckworth, to your knowledge?

A. Well, I know we took orders from him.

Q. What did you do then, after talking to Mr. Duckworth? A. I went back downstairs.

Q. Where were the other women?

A. They were down there at the foot of the stairs.

Q. What occurred then, if anything?

A. Well, none of us punched back in for our lunch hour to go back to work, we wanted to talk to Mr. Martini first, and we had told Mr.—someone told Mr. Duckworth—I'm not sure who it was—that we would go back to work as soon as he would come down and talk with us. So then he came down and talked with us. [675]

Q. Who came down? A. Mr. Martini.

Q. And did you observe who was with him at that time? A. Leonard Duckworth.

Q. Was anybody else?

(Testimony of Lila Mae Layman.)

A. No, not that I know of.

Q. And will you tell us what was said at that time, to the best of your recollection, and tell us who said it.

A. Well, Mrs. Storey and myself were both talking. We asked him if he would consent to meeting with us.

Q. When you say you asked him, who are you referring to? A. Mr. Martini.

Q. What did he say, if anything?

A. He said no. So we went back to work.

Q. Was anything else said, to your recollection?

A. Not that I can remember.

Q. I see. Did you see Mr. Martini after that on that day? A. Yes.

Q. And will you tell us the circumstances under which you saw Mr. Martini on that day?

A. Mr. Duckworth came to my machine and told me that I was wanted in the office.

Q. What did you say, if anything?

A. I said O.K. and shut my machine off and went with him.

Q. I see. Will you tell us what time of day it was, to the [676] best of your recollection?

A. As far as I can remember, it was about a half hour before quitting time, twenty minutes or something like that.

Q. And did you go with Mr. Duckworth at that time? A. Yes.

Q. Where did you go?

A. We started for the office but—I can't re-

(Testimony of Lila Mae Layman.)

member just where it was, we—Mrs. Storey joined us.

Q. Did Mrs. Storey join you? A. Yes.

Q. Tell us what occurred then; what did you do then?

A. Then we went on up to his office.

Q. When you say “we,” who are you referring to?

A. Mrs. Storey, Mr. Duckworth and myself.

Q. Will you tell us what office you went to?

A. Mr. Martini’s office.

Q. And where is that located?

A. Ustairs.

Q. Upstairs where?

A. By the lab is all I can tell you, in the plant.

Q. I see. And when you got into Mr. Martini’s office, was Mr. Martini there? A. Yes.

Q. Have you identified all the persons who were present at that time? [677] A. Yes.

Q. Will you tell us now, to the best of your recollection today, what was said and who said it?

A. Well, I do remember when we first walked in the door he said he knew Mrs. Storey.

Q. Who said that? A. Mr. Martini.

Q. All right, go ahead.

A. And that he was rather surprised at her—I don’t remember just the exact words he used—getting involved in this—had something to do with the Union. Anyway, being she had always been such a good worker, he was surprised at her, and then he said he didn’t know me, but that he was getting

(Testimony of Lila Mae Layman.)

to know me, and he told us that we had better think it over very carefully before we got ourselves involved in something we would be sorry for.

Q. Do you recall anything else that was said at that time, Mrs. Layman?

A. I know there was a lot more said, but it's been such a long time ago.

Q. Have you exhausted your recollection?

A. Yes.

Q. Was any mention made about talking about the Union? A. Yes.

Q. Will you tell us what was said in that regard?

A. He said that while we were working for him and he was paying [678] us that he didn't expect us to go around talking Union, but that while we were on our own time—I don't remember just how he put it, but anyway we could talk Union on our own time, and I wasn't quite sure what he had said, so I asked him to repeat it, and he repeated it; and I told him then that I was going to continue on my own time.

Q. What did he say to that, if anything?

A. I think that was when he had told us that we better think it over before we got ourselves involved in something that we'd—that we would be sorry for, but that he admired our spirits.

Q. Is that all you recall of the conversation?

A. Yes.

Q. How long were you in Mr. Martini's office at that time?

(Testimony of Lila Mae Layman.)

A. Well, as close as I can recall, I would say it was about an hour and twenty minutes or an hour; I'm not sure.

Q. Were you there past quitting time?

A. Yes.

Q. You say you last worked for the Company on October 15, 1954? A. Yes.

Q. Before that date did you have any conversations, or were you present at any time when Mr. Martini said anything about the Union?

A. Yes.

Q. Do you recall when it was? [679]

A. I don't recall the date, no.

Q. How long was it, to the best of your recollection today, before you were laid off, before October 15th?

A. Well, to the best of my recollection, it was two or three weeks before we were laid off.

Q. Can you tell us where you were at the time?

A. The doorway of the plant.

Q. And will you tell us, to the best of your recollection today, what time of day it was?

A. I'm not sure whether it was at lunch hour or on our break.

Q. Was anybody with you at the time?

A. Yes.

Q. Can you identify who was present?

A. Mary Russell was with me.

Q. Was there anybody else present?

A. There were other girls standing around, but I don't recall who they were.

(Testimony of Lila Mae Layman.)

Q. Was Mr. Martini there at the time?

A. Yes.

Q. Was anybody with Mr. Martini, to your recollection today? A. Not that I can recall.

Q. Can you tell us what occurred at that time, what was said and who said it?

A. Well, I don't know what brought the subject up, but I do recall that he said that he would close the plant down rather [680] than to see it go Union, because he couldn't afford to pay Union wages.

Q. When you say "he," who are you referring to? A. Mr. Martini.

Q. What else was said, if anything, at that time?

A. I can't remember anything else.

Q. Now, during the time that you were working for Sagu or Molino, did you see the Union representatives out at the plant on occasions?

A. Yes.

Q. How often did you see them out there?

A. Every time they came out, which—

Q. Where—Have you finished? A. Yes.

Q. I don't want to interrupt you. Where would you observe them, observe the Union representatives while you were there?

A. Out on the highway.

Q. And did you at any time go out and talk to them? A. All the time.

Q. Did you at any time—Did Mr. Martini say anything about that to you?

A. No, the only thing he ever said to me was one day, when we were coming back from the Union

(Testimony of Lila Mae Layman.)

car to the plant, and Charley was standing out in front, and he asked us if we were going steady with Mr. Martini, and I said sure. [681]

Trial Examiner: With whom?

The Witness: With Charlie.

Mr. Berke: May we have Charlie's last name?

Q. (By Mr. Magor): Was that Charlie Ciolino again? A. Yes.

Q. Who was with you at this time?

A. Mary Russell.

Q. Was anybody with Mr. Martini at the time?

A. Mr. Duckworth was standing there with him.

Q. And can you tell us what time of day it was? I'm referring to the conversation you just related.

A. It was during our lunch hour.

Q. I see. Can you tell us where it occurred, where you were at the time you were talking to Mr. Martini?

A. At the doorway of the plant, just before you go in the plant.

Q. I see. Can you tell us, to the best of your recollection today, when it was that this occurred?

A. I would say approximately three weeks before we were laid off.

Q. Did you go to work the next working day after October 15th, 1954? A. No.

Q. Why didn't you go back?

A. Because my name wasn't called. [682]

Q. And when wasn't your name called, was that at the meeting of October 15th? A. Yes.

Q. Were you laid off at that time?

(Testimony of Lila Mae Layman.)

A. Yes.

Q. On October the 19th, 1954, the National Labor Relations Board held an election at Sagu or Molino, the Company; did you vote in that election?

A. Yes.

Q. What, if anything, was done with your ballot?

A. It was challenged.

Q. After the election, did you return to the plant at any time after that, and talk to any representative of management?

A. Yes.

Q. Do you recall when that was, to the best of your recollection today?

A. It wasn't very long afterwards, I would say about a week.

Q. About a week after the election?

A. Yes.

Q. Who, if anybody, was with you at the time?

A. Mary Russell.

Q. What representative of management—Strike that. With whom did you speak?

A. Mr. Martini.

Q. Where were you talking to Mr. Martini?

A. Out at the warehouse, the same one that we got laid off from.

Q. That is where this meeting was on October the 15th?

A. Yes.

Q. Same warehouse, is that it?

A. Yes.

Q. Who was present with Mr. Martini at the time, if anybody?

A. No one that I—

Q. Was anybody with you and Miss Russell, or Mary Russell?

A. No.

(Testimony of Lila Mae Layman.)

Q. Will you tell us now, to the best of your recollection today, what was said and who said it and identify the persons speaking.

A. Well, I asked Mr. Martini if there was any chance of getting back on, and he said no, that he didn't need any more help at the present time, that the warehouse was filled up; and then he made the remark that he had told me that I should have thought it over before I got myself involved in something I would have been sorry for, and he told us that the Union never works in canneries, in the apple industry, it works in the big plants like GMC and the automotive industry.

Q. When he told you that you should have thought it over, did you make any reply to that?

A. Yes, I did.

Q. What did you say?

A. I said, "Oh, I did." [684]

Q. Did he say anything at that time about hiring women back? A. Yes.

Q. What did he say?

A. He said that he was calling the women back according to their seniority, and that if he needed more help he would call us back, before he hired new girls.

Q. And what else was said, if anything?

A. Well, I gave him my phone number, my name and address.

Mr. Berke: What? What was that?

(Answer read.)

(Testimony of Lila Mae Layman.)

The Witness: And he told us that he would call us if he needed us.

Q. (By Mr. Magor): I see. Did you ever receive a call from the Company to go back to work?

A. No. [685]

* * * * *

Q. (By Mr. Magor): Mrs. Layman, during the time that you were employed by Sagu or Molino, what type of job, or what job did you say you had?

A. Well, when I first started I was a trimmer; after that I did everything, I was slicer, peeler, specker, trimmer, sorter, I guess that's about all.

Q. During the time that you were working for the Company, did you ever see an apple decorated?

A. Yes. [686]

Q. Do you recall when it was?

A. I don't recall just what date it was, no, sir.

Q. Did you see one decorated on one date, on one occasion or more than one occasion?

A. More than one.

Q. How many times would you say you had seen a decorated—

A. Well, I couldn't count the times. I have seen them decorated.

Q. And when you refer to decorated apples, will you explain for the Trial Examiner's understanding what you are referring to or how the apple looked?

A. Well, some of them had faces drawn on, cut on them, and others were tied in ribbons, and

(Testimony of Lila Mae Layman.)

others were stuck up on the machinery, the peelers; then there was one on the bulletin board.

Q. How did the one on the bulletin board look; can you describe it, please?

A. Well, somebody had fixed the face on it, put hair over the top of the apple, and put a cigaret in its mouth.

Q. Did you ever decorate apples yourself?

A. Yes.

Q. What would you do to them?

A. Make faces.

Q. And how would you make the faces?

A. With a trimming knife, I'd cut the eyes and put a plug in [687] for the nose.

Q. What sort of a—What would you use for a plug? A. A piece of apple.

Q. And will you describe it—Have you finished describing it? A. Yes.

Q. And when you cut the eyes out, how would you cut the eyes out?

A. Well, you take your knife and just poke a hole in it.

Q. Were you ever warned at all about doing this, by any floor lady? A. No.

Q. Any representative of management ever warn you about it? A. No.

Q. About decorating apples. To your knowledge, or in your presence, was anybody else ever warned by any representative of management about decorating apples? A. No.

(Testimony of Lila Mae Layman.)

Q. To your knowledge, was anybody discharged for decorating apples?

A. Not while I was working.

Q. On the occasion that you were called up into the office by Mr. Martini, when Mrs. Storey was present, do you recall that date? A. Yes.

Q. Would you describe how your machine looked at that time? A. Yes.

Q. Tell us—describe it.

A. I had two apples—well, we had a guard up on the front of our machine; it was made out of tin and fastened on with four pieces of wire. Well, those four pieces of wire poked up in the air, and I had two apples on this side and two apples on this side.

Trial Examiner: Left and right.

Q. (By Mr. Magor): And would you describe the apples for us; what, if anything, was done to them? A. I just set them up there.

Q. Mrs. Layman, during the time that you were working for the Company, did any representative of management ever comment to you about decorated apples? A. No. Could I change that?

Q. Surely.

A. My floor lady did tell me I made a very pretty one one day.

Q. And who was your floor lady?

A. Edna Hardin.

Q. Do you recall when it was that Edna Hardin told you that? A. No, I don't.

(Testimony of Lila Mae Layman.)

Q. Tell us how long it was before you were laid off, to the best of your recollection today.

A. I would say it was approximately the last part of June. [689]

Q. And where were you at the time?

A. I was trimming.

Q. Do you recall what time of day it was?

A. Well, it was in the afternoon, because I asked to get relieved from my machine sometime in the afternoon.

Q. I see. Was anybody else present at the time besides yourself and Mrs. Hardin, to the best of your recollection?

A. I know there was someone, but I don't remember who it was.

Q. Would you describe the apple on that occasion?

A. I had made a face on it, and put part of the core up on top for a hat, in the hole on top.

Q. I see. And where was the apple?

A. Sitting up on the—well, piece of metal by the water that came down, that we put the apples in—took the apples on down.

Q. I see. Will you tell us now to the best of your recollection what Mrs. Hardin said, or give us the conversation.

A. I can't remember exactly what was said, but I do know that she told me that it was pretty.

Mr. Magor: You may examine.

(Testimony of Lila Mae Layman.)

Cross Examination

Q. (By Mr. Berke): Did you ever make a second core hole in an apple and take the core and plug it in and then send it down the line to be processed?

A. I made a second hole a lot of times, but I never took the core— [690]

Q. You never took and put the core back in and sent it down the line to be processed?

Mr. Magor: Just a moment. I object to that on the ground that it assumes facts not yet in evidence, that a second core hole was put in the apple and it was sent down the line to be processed.

Trial Examiner: Well, the word "processed," to be processed, I think, could be left out, Mr. Berke; sent down the line anyway.

Q. (By Mr. Berke): All right. Did you send it down the line?

A. I never inserted the core back in.

Q. You never did anything like that?

A. No. [691]

* * * * *

Q. Well, you testified that some three or four days before Mrs. Storey was discharged you recalled an incident where you approached Mr. Martini, or a group of you, and asked him if he would meet with the Union representatives, is that right?

A. Yes. [693]

* * * * *

Q. All right. Did you see the fork-lift in operation while you were standing there in the group?

(Testimony of Lila Mae Layman.)

A. Yes, it came through the door, we had to move.

Q. You had to move? A. Yes. [697]

* * * * *

ELLA HERRERIAS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [709]

Direct Examination

* * * * *

Q. (By Mr. Karasick): Do you remember the date that the reduction to one shift occurred, in 1954, Mrs. Herrerias?

A. You mean the day that we went on the day shift or went off—

Q. No, the day when you held the meeting and the employees were told there would be a reduction to one shift? A. I think it was October 15th.

Q. Do you remember the day before that seeing some of the employees coming to the plant wearing Union buttons?

A. No, not until—the day before, I believe it was. [721]

Q. The day before?

A. The day before October 15th, yes.

Q. Was the first time you saw them wearing Union buttons? A. That's the first time.

Q. Do you know Erma Bate, Mrs. Herrerias?

A. I do.

Q. And was she one of the sorters at the plant?

A. That's right.

(Testimony of Ella Herrerias.)

Q. In 1954? A. Yes, sir.

Q. And do you recall that one day at the plant out there she gave you a list which she told you was a list of the members of the Union at the plant? A. She never gave me no list.

Q. She didn't? A. Not at the plant, no.

Q. Did she give you a list someplace else?

A. At my house.

Q. I see. And when was it that she gave you that list? A. That was October 16th.

Q. Now, I hand you a document consisting of eight typewritten pages and ask you if that is the list to which you are referring. Would you look at it carefully, Mrs. Herrerias.

A. That's right.

Q. It is the list? [722] A. Yes.

Q. Now, I notice that there is a notation there in pen and ink on it,— A. Yes.

Q. —running lengthwise across the paper at right angles to the typewritten matter.

A. Yes, you mean—

Q. Yes, which begins with the words 2/4/55 and ends with your initials. A. Yes.

Q. Was that inscribed on the list by you? Is that your handwriting?

A. That is my handwriting, yes.

Q. And that is true of each of the eight pages, is it not? Will you look through them and see? That is true, is it not? A. Yes, yes.

Q. Each of those pages are inscribed in the same

(Testimony of Ella Herrerias.)

way by you in your own handwriting and signed by you, is that right?

A. No, I didn't write that, I just signed this. Mr. Grami wrote that. This is my signature on there.

Q. The name is yours? A. That's right.

Q. But it was subscribed to—the bottom of the writing put on by Mr. Grami, you say?

A. The signature is mine but the writing is Mr. Grami's. [723]

Q. And your signature endorses what the writing by Mr. Grami says to be true, does it not?

A. That's right.

Mr. Karasick: I offer the document in evidence as General Counsel's Exhibit 32.

Trial Examiner: Any objection?

Mr. Berke: I object to it on the ground that it is irrelevant, immaterial, no proper foundation has been laid for its admission. There is no showing here that this is the list Mrs. Bate got.

Trial Examiner: I will receive General Counsel's Exhibit 32.

* * * * *

Q. (By Mr. Karasick): Now, after the list was given you by Mrs. Bate, Mrs. Herrerias, it was shown to Mr. Duckworth at the plant, was it not?

A. No, I took it to his home. [724]

Q. To his home? A. Yes.

Q. Now, is that Mr. Duckworth the same Leonard Duckworth who was a superintendent last year at the plant? A. Yes. [725]

* * * * *

(Testimony of Ella Herrerias.)

Q. (By Mr. Karasick): Why did you show this list to Mr. [729] Duckworth, Mrs. Herrerias?

A. Mrs. Bate brought this to my home in the afternoon of Saturday, I remember distinctly, because we weren't working that day—we had been working Saturday, but that day we didn't work—and she came around before noon and she had left it; I got very worried, and I didn't know what to do with it, so I just called him up and asked him—in fact, I told him that I had a list, and I didn't know what to do with it. I suggested if he wanted to see it—— [730]

* * * * *

Q. And did he refuse to look at it when you gave it to him?

A. No. It was rather embarrassing, when I took it to him, so when I saw that he wasn't in no condition to see it—so I just—I left it there. [731]

Q. What was embarrassing about it?

A. Well, he would—he was just a little bit happy, so I just left it there with him. I didn't—I told him to bring it back to me the following day.

Q. I see. And this was when you brought it to him?

A. That very same night of October 16th, the day that she brought it to me.

Q. And by "happy," you mean he had had one too many, perhaps? A. Well, yes.

Q. I see. And did he bring it back to you the next day?

A. No, he said that he hadn't even had time to

(Testimony of Ella Herrerias.)

look at it. In fact, he told me he didn't even remember that I had even taken it to him.

Q. That was when? A. On a Monday.

Q. On a Monday. Did he finally give it back to you? A. The following day.

Q. On Tuesday? A. Yes.

Q. I see. Was it up in the lab for a while on one of the desks?

A. I don't know. He just told me it was upstairs, to get my papers, and that's all I know. [732]

* * * * *

Q. (By Mr. Karasick): Do you know Mrs. Dickerson, Mrs. Herrerias?

A. I know her, yes; that is, working with her.

Q. Yes. That is what I meant. Mrs. Elsie Dickerson. [737]

A. That's right.

Q. She was discharged at the plant last October sometime I believe, do you remember?

A. Yes; yes, sir.

Q. You, as floor lady, ordered her discharge, did you not?

A. Well, I wouldn't put it that way.

Q. Well, how would you put it?

A. I told Mr. Duckworth about it, and he told me to discharge her.

Q. On your recommendation?

A. Not necessarily, no. I just told him what was happening.

Q. This is because of what Mrs. Dickerson was doing with apples, is that right? A. Yes.

(Testimony of Ella Herrerias.)

Q. It was what she was doing with apples, right?

A. Yes, that's right.

Q. You saw what was going on? A. I did.

Q. And you wanted to be sure, and you observed her for a couple of days at this, and then you told Mr. Duckworth about it and Mrs. Dickerson was discharged, right?

A. That's right, that's right.

Q. Now, this is a pretty dangerous thing to be doing in the plant? A. It certainly is. [738]

Q. What was dangerous about it, Mrs. Herrerias?

A. Well, in the first place, when an apple is cored in two places, and if it is going for slices, it breaks your apples up into very small pieces, and if it goes for applesauce you are endangering the food, because of an extra core that goes through into your sauce.

* * * * *

Q. Ever seen any decorated apples in the plant, Mrs. Herrerias? [739]

A. Well, when an apples comes through that is a little bit out of the ordinary, the girls take it, and they set it up before them.

Q. And you have seen a number of these apples in the plant last year and prior years, have you not? A. Decorated apples?

Q. Yes.

A. Yes, before the girls; they put them in front of them, but it does not go down the line.

Q. Did you ever see a decorated apple in the

(Testimony of Ella Herrerias.)

line, Mrs. Herrerias? A. No.

Q. Never? A. No.

Q. Never see anything in the troughs or tanks with the apples before they were peeled, that is, foreign materials of any sort, rubber balls?

A. I never seen a rubber ball.

Q. Nothing like that? A. No, sir. [740]

* * * * *

Q. (By Mr. Karasick): Do you remember, Mrs. Herrerias, going up to the trim belt near the peelers and watching Mrs. Dickerson while she did these things to the apples? A. Yes, sir.

Q. And—

Trial Examiner: What do you mean “these things”? Please explain.

Q. (By Mr. Karasick): The coring that you have talked about; right? A. Yes.

Q. Putting the cores in?

A. Yes, that’s right.

Q. And you watched her for some time doing this, right? A. I did.

Q. Now, when you told this to Mr. Duckworth, he told you to fire her then, but you waited till the end of the day, you felt it was better to do it then, and gave her her release then, is that right?

A. I suggested that—I suggested that we just wait and let her have the day, finish up the day, and then I would notify her at the end of the day.

Q. And that was agreeable to Mr. Duckworth, and that was what was done, wasn’t it?

A. That was right, correct. [742]

(Testimony of Ella Herrerias.)

Q. By the way, Mrs. Herrerias, you didn't talk to Mrs. Dickerson about this before she was discharged, did you? A. No, sir, I did not. [743]

* * * * *

Q. Do you remember a discussion in the plant before the October 15th reduction to one shift, upstairs in the office when you and Mr. Duckworth and Esther Doty and Mary McGuire and Danny Shuster and Steve Struempf were present?

A. No, Mrs. McGuire wasn't present.

* * * * *

Q. (By Mr. Karasick): At this meeting with Mr. Duckworth, Charlie Williams, Danny Shuster, Johnny Aguire, Steve Struempf, Esther Doty and Mr. McGuire were present; does that refresh your recollection about that? You are right about Mrs. McGuire, she was not there.

A. I know, I don't think she was there, no, sir.

Q. No, you are right, but you know now—do you have in mind the meeting I am talking about upstairs in the office? [744]

A. I think I do, I think I do.

Q. Before the reduction. And there was a discussion at that time about people who would be chosen to be kept and people who would be laid off on October 15th, right? A. Yes.

Q. And there was a discussion at that time about whether they were Union people or were trouble-makers or agitators or words to that effect as to some of them, is that right?

(Testimony of Ella Herrerias.)

A. They tried to pick out according to their ability.

Q. Yes, and to what else?

A. That was about all.

Q. No mention made—is it your testimony—about trouble-makers? A. No.

Q. Union people or agitators?

A. No; no, sir. That was not—that Union—I mean trouble-makers or agitators wasn't brought up at all. [745]

* * * * *

Q. (By Mr. Karasick): Now, Mrs. Herrerias, do you know what led up to the discharge of Mrs. Dickerson, why she was discharged?

A. Yes, for putting that extra core in the apple.

Q. In one apple? A. No, more than one.

Q. How many? A. I didn't count them.

Q. Well, lots of them anyway?

A. There was quite a few. [748]

* * * * *

Q. Do you remember having made an affidavit which you signed and swore to on February 9th of this year before Mr. Mathews; is that right?

A. I remember that, but I could have said a lot of things that I don't know what I said. [755]

* * * * *

Q. Now, let me call another matter to your attention, Mrs. Herrerias. Do you recall that after the affidavit was made, you wrote in and said that you protested this and you wanted it back?

A. I did. [758]

* * * * *

(Testimony of Ella Herrerias.)

Q. (By Mr. Karasick): Do you remember, Mrs. Herrerias, that on March 22nd, 1955, in the Sebastopol office of your personal attorney, Frank W. Finn, you held a meeting with the Chief Legal Officer of the Twentieth Regional Office of the National Labor Relations Board, Mr. Penfield, and the Regional Director, Mr. Brown?

A. Yes, sir.

Q. Is that correct? A. Yes, sir, that's right.

Q. In the presence of those three gentlemen, were you questioned regarding the affidavit you had made, and you read the affidavit, and with three minor exceptions you re-affirmed it as correct?

A. Yes, but after they left I spoke to the attorney and told him that there was more corrections to be made.

Q. To your attorney? A. Yes, sir. [760]
* * * * *

Q. (By Mr. Karasick): You don't deny making that statement in the affidavit, do you?

A. That didn't all occur as you read it.

Q. I am not asking you that. I am merely asking you if you made that statement in the affidavit. Is that right or not? It is, isn't it?

A. It is in the affidavit, but those aren't all my words. [762]

* * * * *

Cross Examination

Q. (By Mr. Berke): Mrs. Herrerias, there has been reference made by Mr. Karasick to an affi-

(Testimony of Ella Herrerias.)

davit that you gave to an agent of the Board. That agent was Mr. Mathews, was he not?

A. That's right.

Q. Do you see him here in the hearing room?

A. Yes, sir.

Q. Is he the man with that light suit and black tie? A. Yes, sir.

Q. Where was this affidavit taken from you?

A. At the Union hall, in Sebastopol, in the office.

Q. That is in the Union, Local 980, of the Teamsters?

A. I believe that is the name of it. I don't know.

Q. How did you happen to go there?

A. Well, Mr. Grami called me up in the afternoon and asked me if he and a friend could come out to the house.

Q. Now, was that the same day that you went to the Union hall? A. Yes, sir.

Q. All right. And how did you know it was Mr. Grami that talked to you?

A. He told me.

Q. On the telephone? A. Yes, sir.

Q. Now, go ahead, tell us the conversation.

A. He asked me if he could come over, he had a friend that he would like for me to talk to, and I told him no, that I couldn't see him, that I was—I had promised—just promised to help my husband, and I wouldn't be able to see him at all. [765]

* * * * *

The Witness: That I wouldn't be able to see him

(Testimony of Ella Herrerias.)

at home, so then he asked me if I would come down to the office that evening, and I told him at first I didn't think I could; so then he told me if I had—if I came down that it would be to my benefit, if I would come down, so I told him then I didn't know if I could get away or not, but I would try, and if I could I would be there around between 7:30 and 8:00, somewhere around in there.

* * * * *

Q. (By Mr. Berke): Did Mr. Grami say anything to you about who would be present if you came down to the Union office?

A. No, sir, he didn't.

Q. Was that the end of your conversation with him? A. That was it.

Q. Did you go down to the Union office that night? A. I did.

Q. About what time?

A. I think I left the house around 7:30.

Q. And where was the Union office located then, as near as you recall? [766]

A. Well, it was off of Petaluma Street, but I don't know the street that the hall is on. It is on the corner, the hall is on the corner.

Q. In what town? A. Sebastopol. [767]

* * * * *

Q. (By Mr. Berke): What time did you arrive at the Union hall?

A. I'd say roughly around quarter to eight, I guess.

Q. This was a quarter to eight in the evening?

(Testimony of Ella Herrerias.)

A. Yes.

Q. And when you got there, where did you go?

A. I went to the hall.

Q. Did you go inside? A. I went inside.

Q. Did you go into any office?

A. The Union office.

Q. And who did you see there, if anybody?

A. Just Mr. Grami.

Q. Did you have a conversation with him?

A. I think he said something to me about—that he wanted to help me and for me to tell the truth to this gentleman.

Q. Did he say who the gentleman was?

A. I don't remember if he told me then at that time or not, or if he waited till he returned and introduced me to him. I don't remember.

Q. I see. Did some other man come in while you were there, shortly after you arrived?

A. Later, later.

Q. About how long after your arrival? [768]

A. Maybe five or ten minutes. I don't know.

Q. And did Mr. Grami introduce you to this man? A. I believe he did.

Q. And who was this man you were introduced to? A. Mr. Mathews.

Q. Did Mr. Grami remain, after he introduced you to Mr. Mathews?

A. For a very short period.

Q. Did you have any conversation with Mr. Mathews after your introduction?

A. Not till after Mr. Grami left.

(Testimony of Ella Herrerias.)

Q. I see. Mr. Grami left a couple of minutes after you were introduced to Mr. Mathews?

A. More or less.

Q. All right. Did you see where Mr. Grami went? A. No, sir.

Q. What took place then, after that?

A. Well, we sat—he asked me to sit at the desk.

Q. Who asked you? A. Mr. Mathews.

Q. That was in the Union office?

A. Yes, sir.

Q. All right. And did you sit at the desk?

A. I did.

Q. Then what took place? [769]

A. He spoke to me about something, then he asked me to take the oath. I took the oath, and then he put a—his wallet with a picture and “United States Government” in front of me.

Q. Now, do you remember the oath that he gave to you?

A. No. Oh, “I swear to tell the truth, the whole truth, and nothing but the truth.”

Q. Was anything said about perjury to you?

A. No, not at that particular point, I don't remember, no.

Q. Was that term used a little later on?

Mr. Karasick: Now, just a moment.

Q. (By Mr. Berke): At any—during this meeting?

Mr. Karasick: Go ahead. I will wait.

A. Well, no, not at the beginning. I tell you, when I went to the hall I was in very bad shape.

(Testimony of Ella Herrerias.)

I had a very—physically and mentally, and I was just getting over the virus, and I shouldn't have gone, but when he told me it was to my benefit I thought it was concerning this list, which I was very anxious to clear. That was the reason why I went.

Q. (By Mr. Berke): All right. You don't remember whether Mr. Mathews used the word "perjury" that evening?

A. Well, Mr. Mathews was talking to me, but when I saw the "United States Government," I don't know, it just seemed like everything went blank before me, and he was talking to me, but I couldn't tell you what he said.

Q. All right. What time did you leave that Union hall? [770]

A. 1:30 in the morning.

Q. You had been there from quarter to eight till 1:30 in the morning?

A. Yes.

Q. Now, while you were there did Mr. Mathews ask you questions?

A. Yes.

Q. And was there a telephone in that office where you and Mr. Mathews were at the time?

A. Yes.

Q. Did Mr.—was there a clock on the desk?

A. Yes.

Q. Whose clock was that, do you know?

A. It was on the desk. I presume it belonged to the office.

Q. All right. Now, during the time that you were there, did that telephone ring?

A. I think it rang twice.

(Testimony of Ella Herrerias.)

Q. Twice. Do you know about what time it rang the first time?

A. About—not too sure, but I think it was around about 11:30.

Q. 11:30, p.m.?

A. More or less. I don't remember the exact time.

Q. And who answered the phone?

A. Mr. Mathews did.

Q. Could you hear his end of the conversation?

A. His end?

Q. Yes. A. I could hear it, yes.

Q. Do you recall in substance what he said?

A. No, I don't.

Q. Do you recall anything that you heard him say? A. No, I don't.

Q. Did he finally finish the conversation at some point, after he answered the phone?

A. Yes, he hung up the receiver.

Q. All right. And after he hung up, did he continue to question you? A. Yes, sir.

Q. When was the next time that the phone rang, if you recall, approximately?

A. Approximately about an hour—approximately about an hour, I imagine, not later.

Q. Would this be about 12:30 then?

A. Approximately.

Q. 12:30, a.m.? A. Possibly.

Q. And did Mr. Mathews answer the phone again? A. Yes, sir.

Q. And were you able to hear his end of the

(Testimony of Ella Herrerias.)

conversation on that occasion? [772] A. Yes.

Q. Can you tell us, as near as you can recall, what he said?

A. I don't remember what he said.

Q. And then when he completed talking, did he hang up? A. Yes, sir.

Q. And then did he go back and continue questioning you again? A. Yes, sir.

Q. Now, tell us whether or not, while you were there with Mr. Mathews, from a quarter to eight until 1:30 a.m. the next morning, you had protested being there that late?

A. I merely said to him, as part of the questioning at one point—I asked him just how much longer, and that was all I said to him.

Q. What time was that?

A. I don't know, I don't remember.

Q. Did you tell Mr. Mathews anything about your physical condition, your mental condition?

A. I did mention something about that. I didn't know, that my head—I said it just seems to be light. I said, I don't know if I can answer too many questions or not. [773]

* * * * *

Q. (By Mr. Berke): Now, you testified here under questioning by Mr. Karasick that some of the things Mr. Karasick read to you from your purported affidavit were not so, and that you stated those things with the help and assistance of Mr. Mathews. Please explain that.

A. Well, I tried to tell him to the best of my

(Testimony of Ella Herrerias.)

ability, and he would—he'd say, well, would it be for the union or would it be non-union.

Q. And what did you say?

A. Well, I looked at him as much as to say, well, I'd have to say something to him, so I just would nod my head.

Q. Did he suggest the words "union" or "non-union" to you? A. In parts of it.

Q. At 1:30, was that the time when Mr. Mathews finished taking your affidavit?

A. Yes, I believe it was.

Q. Was that taken in his handwriting or were you writing it down?

A. No, he was writing it.

Q. I see. And what happened then at 1:30?

A. When he finished he asked me to read it, and I asked him, I said, "Do I have to read this tonight?" and he said he would [774] rather that I would, yes.

Q. He said he would rather you read it that night?

A. Or words to that effect. I don't remember just exactly what the words were.

Q. All right. And did you read it?

A. Oh, I did.

Q. Now, did you know what you were reading?

A. Not too much.

Q. Then what happened?

A. Then he brought the paper over to me and asked me to make corrections.

Q. And did you make the corrections?

(Testimony of Ella Herrerias.)

A. Well, I initialed rather.

Q. Well, who actually made the corrections?

A. Mr. Mathews did.

Q. I see. Were those corrections at your suggestion?
A. No, sir. [775]

* * * * *

Q. I see. Did Mr. Grami reappear?

A. He came in later.

Q. What time?

A. Well, I was there till 1:30 and he came in, why, just before that.

Q. Just before 1:30? A. Yes, sir.

Q. What were you doing at the point when he came in?
A. I believe I was initialing.

Q. Now, subsequently, were you informed that a recording had been made of your conversation with Mr. Mathews that evening?
A. No.

* * * * * [777]

Q. (By Mr. Berke): Did you, after that, write letters to the Twentieth Regional Office of the Labor Board?
A. I did.

Q. And was that the letter Mr. Karasick referred to when he was questioning you?

A. Yes, sir.

Mr. Berke: May we have that letter, Mr. Karasick, if you have it, please.

Mr. Karasick: If you show the purpose for it, yes.

Mr. Berke: I want to show that she asked for the return of that affidavit and her statement in there of the circumstances under which it was

(Testimony of Ella Herrerias.)

taken, and her position with respect to the contents of it.

Mr. Karasick: I think Counsel is well aware of the fact—I dislike to refuse a request of this sort, but I think Counsel is well aware of the fact that I am bound by the Board's [779] rules and regulations which prohibit me from handing over contents of the Regional Office file.

Mr. Berke: I don't think it goes to that, Mr. Karasick, and you know it.

Mr. Karasick: I think it does go to that, Mr. Berke, and I think you equally well know it.

Mr. Berke: All right, if Counsel refuses I am going to ask the Trial Examiner to instruct him to turn it over.

Trial Examiner: Well, do you have them in the room?

Mr. Karasick: Yes, I have them right here in the file, Mr. Examiner.

Trial Examiner: All right, I will ask you to deliver that to Mr. Berke.

Mr. Karasick: Oh, well, let me consult the rules and regulations to be sure that I am not holding myself in jeopardy here, Mr. Examiner, in following your bidding.

Trial Examiner: All right. Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Karasick: I am referring to Section 102.87 of the Board's Rules and Regulations, Series 6 as Amended, which provides as follows:

(Testimony of Ella Herrerias.)

No Regional Director, Field Examiner, Trial Examiner, attorney, specially designated agent, General Counsel, member of the Board or other officer or employee of the Board shall [780] produce or present any files, documents, reports, memoranda or records of the Board, or testimony in behalf of any party to any case pending in any court or before the Board or any other board, commission or other administrative agency of the United States, or of any state, territory or the District of Columbia, with respect to any information, facts or other matter coming to his knowledge in his official capacity, or with respect to the contents of any files, documents, reports, memoranda or records of the Board, whether in answer to a subpoena, subpoena duces tecum or otherwise, without the written consent of the Board or the Chairman of the Board, if the official or document is subject to the supervision or control of the Board, or the General Counsel—or if the official or document is subject to the supervision or control of the General Counsel.

Trial Examiner: Please don't read that. I am well aware of that. Of course it doesn't come into my possession officially, so I don't feel that I am bound, but what you are saying is that you respectfully decline to comply with my request that you turn it over to Mr. Berke until Mr. Berke has procured the consent of the Board?

Mr. Karasick: I would say on the basis of this rule I am bound to do that, too, Mr. Examiner, as I interpret it.

(Testimony of Ella Herrerias.)

Trial Examiner: Well, that is what you are doing.

Mr. Karasick: Yes. If you feel that my interpretation [781] is wrong, I'd be glad to be disabused on that.

Trial Examiner: I didn't say that, I didn't say that. I just want it clear on the record.

Mr. Karasick: I want it clear that that is the only reason I am refusing to produce this document.

Mr. Berke: Will you mark this as Respondent's exhibit next in order.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Mr. Karasick: Oh, by the way, what is the date of that letter?

Mr. Berke: February 18th, 1955.

Q. (By Mr. Berke): Mrs. Herrerias, I show you what purports to be a copy of a letter dated February 18th, 1955, addressed to Mr. Gerald A. Brown, Regional Director, National Labor Relations Board, 630 Sansome Street, San Francisco. Will you look at that and tell us if that is, as you recall, a copy of the letter that you sent to Mr. Brown on that day?

Do you remember the question? A. Yes.

Q. What is your answer? A. Yes.

Q. Did you send that letter to Mr. Brown on or about the date it bears, February 18th, 1955?

A. That's right. [782]

(Testimony of Ella Herrerias.)

Q. In the United States mail?

A. That's right.

Q. And subsequently did you hear from Mr. Brown in response to that letter? A. I did.

Mr. Berke: I offer Respondent's 4 in evidence.

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): Mrs. Herrerias, last week, under questioning by Mr. Karasiek, you referred to a meeting in your attorney's office, some time after you wrote the letter to Mr. Brown. What is your attorney's name, his full name?

A. Frank Finn.

Q. And where does he have his office?

A. In Sebastopol.

Q. Where did this meeting take place, in his office? A. In his office.

Q. Do you know about when?

A. No, I don't.

Q. Approximately how long ago?

A. Approximately—

Q. After you wrote the letter to Mr. Brown?

A. About two weeks, I think, approximately.

Q. Now, as I recall it, you said that after this meeting, or after Mr. Brown left, you told your attorney that there were other corrections. Is that correct? [797] A. That's right.

Q. Will you tell us what those are?

A. The corrections were the ones where the Union's wording was used.

Q. You mean with reference to the Union?

(Testimony of Ella Herrerias.)

A. Yes, sir. [798]

* * * * *

Q. Now, Mrs. Herrerias, at the time Mr. Duckworth told you there was going to be a reduction from two shifts to one shift, you said he told you to pick out your best workers and pick out the ones that you had trouble with, is that correct?

A. That's right.

Q. Now, did you have any workers that had given you trouble? A. I have a few, yes.

Q. What was the nature of that trouble?

A. Well, there was Pauline Ploxa and some other girl had a fight, and Mrs. Ploxa struck this girl across the mouth and they had to be separated.

Q. Now, with respect to the meeting that was held on October 14th, the day before the meeting of the employees in the cannery warehouse, where did that meeting take place? A. Upstairs. [804]

* * * * *

Q. Now, was there any discussion by those present at this particular meeting about this worker being too pro-union or that worker being for the Union or this one being anti-Union? A. No.

Q. How did you pick out the women that you wanted to remain for that shift? A. Myself?

Q. Yes.

A. I picked them out according to their ability.

Q. Now, with respect to Mrs. Dickerson, you remember her discharge, do you not?

A. I do.

Q. Do you recall when it was that you first saw

(Testimony of Ella Herrerias.)

Mrs. Dickerson treating apples in the manner that you described the other day?

A. I found that apples came down through the cage, and I asked the inspector if there was very many apples coming down that way, and she said there was quite a few, so I just walked [807] up and looked at it, because you can tell from the size of the apple where it comes from, because they are graduated, and so I started to investigate.

Q. All right, before we go into that, do you remember the day when you first discovered that?

A. You mean the actual date?

Q. Yes. A. No, I don't.

Q. Was it the same day of her discharge or was it a previous day?

A. No, sir, it was a previous day, because she done it twice.

Q. And did you go back up the line to discover who was doing it?

A. I walked up the line behind the peelers because that way you can see the trimmers down in front.

Q. All right, now, what did you find?

A. I watched Mrs. Dickerson, and I saw her do that to two apples.

Q. While you were watching her?

A. Yes, sir.

Q. That was in addition to the apples you saw?

A. Yes, sir.

Q. And in addition to the apples you were told about? A. Yes, sir.

(Testimony of Ella Herrerias.)

Q. Now, as you went back up the line, you watched each one to [808] see what they were doing?

A. Yes, sir, I go up and watch each one until I find the one I am looking for.

Q. What did you do when you saw Mrs. Dickerson treating the apples in that manner?

A. Nothing. I just told Mr. Duckworth.

Q. What did you tell Mr. Duckworth?

A. I told him Mrs. Dickerson was making holes in these apples and putting these cores in them.

Q. Did you show him the apples? A. I did.

Q. How many did you show him?

A. At least two.

Q. What did he say?

A. Well, he told me, "Well, you know what to do."

Q. And what did you do after that?

A. I didn't do anything. I said I will just wait one more day, and give her one more day on it, the second day.

Q. All right. Now, was Mrs. Dickerson working behind the trimmer that day?

A. That day, yes, sir.

Q. Was that her regular job? A. No, sir.

Q. What was her regular job?

A. Her regular job was in the seed celler. [809]

Q. Do you recall if it was in the morning or the afternoon that you saw her this first time?

A. I believe it was in the afternoon.

(Testimony of Ella Herrerias.)

Q. How did she happen to be working on the trimmer that day?

A. The first time she went there, a girl came up and told me she wanted to go behind the trim line, and that she would relieve her, and I said that that was all right.

Q. Who was that other girl?

A. I don't remember the other girl.

Q. What was this other girl's job?

A. I believe she was a trimmer, I am not sure.

Q. And it was that girl that told you what?

A. She came up and she said Mrs. Dickerson wanted to trade places with her, said Mrs. Dickerson wanted *to back* on the trim line for a little while, and that she would take her place on the seed celler.

Q. And did you give that permission?

A. I did, it was the first time.

Q. Now, when was the next time that you discovered apples in the same condition as you did the first time you have described it?

A. What day?

Q. Yes.

A. I don't recall the day that she was there, twice though.

Q. Was that the day that she was discharged?

A. Yes, sir.

Q. And was that in the morning or afternoon, do you recall?

A. I believe it was in the afternoon.

Q. Where was Mrs. Dickerson working that

(Testimony of Ella Herrerias.)

afternoon? A. She was in the trim line.

Q. Had you given her permission to work in the trim line?

A. Not the second day, no, sir.

Q. Tell us how you discovered the apples on that day?

A. I watched them come down in the basket and I asked the inspector to put aside all apples that came down in that condition again, and when I went back she had about—I think she had two or three, and asked her how many there were, and she said they weren't as bad as the first.

Q. Who was the inspector that you were talking about? A. Virginia Chicano.

Q. What did you do when you found those apples that afternoon?

A. I took the apple and showed Mr. Duckworth and he told me then to let her go.

Q. What did you say?

A. I said, "No, we will wait until the day is over."

Q. And did Mrs. Dickerson finish out her shift?

A. Yes, sir.

Q. And what happened at the end of her shift?

A. When she came out of the shift, I met her and told her [811] she was fired. And she asked me "Why?" And I said, "Because you are making holes in the apples and putting a core in the apple and throwing them down in the water." And she said, "I was only playin'." [812]

* * * * *

(Testimony of Ella Herrerias.)

Q. (By Mr. Berke): Mrs. Herrerias, did either Mr. Martini or Mr. Duckworth or anyone else representing Sagu tell you to try to find an excuse to discharge Mrs. Dickerson? A. No, sir.

Q. Were you looking for an excuse?

A. I was not, no, sir.

Q. You recall the date, October 15th, when the reduction to a single shift was announced to the employees at a meeting in the warehouse?

A. Yes, sir.

Q. Were you at this meeting? A. I was.

Q. When was the single shift to go into effect?

A. The following Monday. [813]

Q. What day of the week was it, if you recall, that the meeting took place in the warehouse?

A. October 15th.

Q. Normally, before the reduction to the single shift, how many days a week did the cannery operate? A. Six.

Q. That is Monday through Saturday?

A. Monday through Saturday.

Q. Did the cannery operate on Saturday, October 16th, the day after the reduction was announced? A. No, sir, they did not.

Q. Did you see Erma Bate on October 16th?

A. Yes, sir. She was at my house.

Q. How do you remember that it was that day that you saw her?

A. That was the day we did not work.

Q. And had you seen her all other preceding Saturdays? A. Yes, sir.

(Testimony of Ella Herrerias.)

Q. That is when the cannery was operating?

A. That's right.

Q. You say you saw her at your house?

A. She was there.

Q. What time of day was it?

A. It was before noon, because I was preparing my lunch.

Q. Will you tell us how she got there and what she did? [814] Did you let her in or did she walk in?

A. No, sir, she walked in.

Q. And where did she come through?

A. I was standing in the kitchen, and she walked into my back porch and into the living room.

Q. Walked into your kitchen? A. Yes, sir.

Q. What took place then, will you tell us what was said?

A. Naturally I was surprised to see her there, and I asked her what she wanted. And she said that here was the list that I had asked her for, and I said that I didn't know anything about a list, and don't leave it here, and she said "I don't want it either."

Q. Was there anything more said between you, that you recall?

A. No, I just asked her if she would like a cup of coffee, and she said, "No, she had to leave."

Q. Did she leave? A. Yes, she left.

Q. Did she take the list?

A. No, sir, she left it.

Q. What did you do with it?

A. I left it laying on the table, just where she

(Testimony of Ella Herrerias.)

left it. I didn't know what it was, and I didn't want anything to do with it. She told me it was a list, so I proceeded to look at it. [815]

Q. All right, and then what did you do with it?

A. I just put it on my dining room table and left it there.

Q. And did you later do anything about it?

A. Well, I didn't know what it was, and I got a little bit worried about it, so I called Mr. Duckworth and I asked him.

Q. Did you telephone Mr. Duckworth?

A. Yes, I did.

Q. Where did you call from?

A. From my house to his.

Q. And did you talk with him? A. I did.

Q. What was said?

A. I told him that this paper was brought to me and I don't know what to do with it.

Q. What did he say?

A. He asked me what it was, and I said that I'd rather not discuss it over the phone, and he said if you can wait, I will be out at the plant Monday, he said that he was going to be home then and if I wanted to come in and bring it to him that I could. And I said to him, "Well, I am coming out that way and I am going out that way, I will stop by and leave it."

Q. And did you later go out to his home?

A. I did.

Q. That same afternoon?

A. That evening. [816]

(Testimony of Ella Herrerias.)

Q. About what time?

A. Between seven and eight—seven thirty and eight.

Q. All right, and what took place there?

A. I walked in and he had company and I saw that he was feeling pretty gay and I stayed for about five minutes, so I just left the paper with him.

Q. Did you discuss it with him at all?

A. No, sir.

* * * * *

Q. Did you see those papers again after that?

A. I saw them the following Tuesday, when he brought them back to me.

Q. Where did you see him?

A. Upstairs in the office. [817]

* * * * *

Q. (By Mr. Berke): All right. Do you know how he happened to bring the papers to the plant?

A. Yes, I asked him to bring them back to me, because I didn't want them laying around.

Q. Did you discuss the paper with him at all?

A. Never said a word to him.

Q. Were those papers used in determining who was going to be retained and who was not going to be retained for the single shift?

A. Definitely not.

Q. Now, Mrs. Herrerias, did you ask Mrs. Bate to get that list for you?

A. No, sir, I did not. [818]

* * * * *

(Testimony of Ella Herrerias.)

Q. Did she give you that list while at work one day?
A. No, sir.

Q. Did you ever ask Mrs. Bate to go up and work on the slicer to find out about the Union?

A. No, sir, I never did, no, sir. [819]

* * * * *

Redirect Examination

Q. (By Mr. Karasick): Mrs. Herrerias, as I understand it, Mrs. Davello told you that this list that you had which is General Counsel's Exhibit 26 was dangerous, was that right? [822]

A. Yes, sir.

Q. When did she tell you that?

A. I think it was the same morning.

Q. The same morning as what?

A. When we was talking on the phone, and then she came over that morning.

Q. I am sorry, I mean it is General Counsel's 32, not 26. When what? What was your answer?

A. That morning. That same day is when she told me.

Q. I see. How did she happen to mention the list?

A. Mrs. Brock had told her that I had it, so then she told me. She started to talk about some list, and I asked her how she knew I had it, and she said Mrs. Brock told her.

Q. It had not occurred to you before that the list was dangerous, had it?
A. Not at all.

Q. As a matter of fact, I think you have testi-

(Testimony of Ella Herrerias.)

Q. Actually, the list did not seem of any importance to you at all, did it?

A. No, it did not.

Q. From the moment you got it until the moment you gave it up?

A. That's right, until Mrs. Davello told me.

Q. Oh, then, did it take on a different complexion to you? A. Yes, it did. [823]

Q. And what kind of a complexion?

Mr. Berke: Just a moment, I am going to object to it as irrelevant and immaterial and argumentative.

Trial Examiner: Overruled. You may answer.

A. She told me that that paper was very dangerous because it was detrimental to the company and to myself.

Q. (By Mr. Karasick): And that had not occurred at all before, had it?

A. No, sir, it did not.

Q. Now, it did not seem too unimportant to give to Mr. Duckworth, did it?

A. No, I was just curious and I called him to ask him what to do with it, because I don't want it.

Q. But you did not think it was any good to you, right?

A. It was good to nobody as far as I knew.

Q. And you gave it to Mr. Duckworth because you thought the list would be good for him?

A. No, sir, I didn't think that.

Q. You figured that if he had it he would be able to use it?

(Testimony of Ella Herrerias.)

A. No, I just thought he would want to know about it, and I didn't know whether it was dangerous or not, and I didn't want to have it.

Q. And he did not tell you anything about it?

A. No, sir. [824]

* * * * *

Q. Do you remember going to a party of Orlin Chapman that night?

A. That night, yes, sir.

Q. The night of October 16th, the night you say you got the list?

A. That's right.

Q. And do you remember that same night that you said that [838] Louise Chapson had signed a Union card as you knew from a list you had received that day?

A. I did say that, yes.

Q. And you so stated in your affidavit, is that right?

A. That's right. [839]

* * * * *

Q. Now, let us get down to this affidavit that you signed and Mr. Mathews asked you to swear to on February 9, 1955, do you remember that?

A. I do. [840]

* * * * *

Q. (By Mr. Karasick): You have some concept or idea of what he wanted to talk to you about, didn't you?

A. I thought he was going to talk about the list, that is what I thought he was going to talk about.

* * * * *

Q. (By Mr. Karasick): Now, you remember that Mr. Mathews, before you started talking about

(Testimony of Ella Herrerias.)

this case and matters relating to the case and the list and other things, talked to you in general about questions and told you that any question that you did not want to answer, you had a perfect right to tell him so? A. I don't believe so.

Q. Will you please answer yes or no to that question?

A. I don't recall any of that at all. [842]

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Q. (By Mr. Karasick): Do you have any difficulty in recalling about your talking to Mr. Martini or Mr. McGuire about it? I will withdraw the question. I will ask you directly, did you talk to Mr. Martini about Mr. Mathews taking an affidavit from you and talking about the case?

A. I don't remember that.

Q. I am talking about any time from February 9, 1955, to the present time? [850]

A. Not to my knowledge.

Q. You haven't talked to Mr. Martini?

A. I don't remember.

Q. You don't remember?

A. I don't remember.

Q. You don't deny that you may have talked to Mr. Martini about it? A. I don't deny that.

Q. Did you talk to Mr. Caldwell about it?

A. I believe I did, I don't know whether I did or not.

Q. Well, make up your mind, Mrs. Herrerias.

A. I don't remember. I know I spoke to him, I don't know if it was that day or not.

(Testimony of Ella Herrerias.)

Q. What day are you talking about? I merely asked you if you ever talked about the statements of Mr. Mathews.

A. Yes, I talked to Mr. Caldwell, yes, sir.

Q. And when did you talk to him first?

A. I believe it was that same day.

Q. What day?

A. The day I went in there with Mr. McGuire, Mr. McGuire called me in and I told him that I had been talking to Mr. Mathews.

Q. How long was that after you talked to Mr. Mathews that you told Mr. Caldwell and Mr. McGuire?

Mr. Berke: She has already answered that. [851]

Mr. Karasick: I am asking the witness. Is Counsel the witness here?

Mr. Berke: The question is not proper.

Trial Examiner: The question is proper.

A. It was about four days, I don't remember exactly how many days.

Q. (By Mr. Karasick): Well, when you talked to Mr. McGuire, was Mr. Caldwell present?

A. No, sir.

Q. That was at another time?

A. I have never met Mr. Caldwell until now.

Q. Did you talk to Mr. Caldwell by telephone?

A. That's right.

Q. When? A. That day.

Q. From where? A. From the office.

Q. And what did you tell Mr. Caldwell at that time?

(Testimony of Ella Herrerias.)

A. I told him I had seen Mr. Mathews.

Q. What else did you tell him?

A. That's all.

Q. What did he tell you?

A. He asked me how I happened to go, and I told him, and he asked me if I had signed the statement, and I said, "Yes," and he told me that then I should ask for the statement. [852]

Q. Ask for it back? A. That's right.

Q. So that the writing of the letter to Mr. Brown regarding the statement and asking the return of it was the result?

A. He suggested it, but I didn't write it entirely under his suggestion.

Q. Whose suggestion? A. My husband.

Q. Your husband suggested it?

A. That's right.

Q. I see. But it was after you talked to Mr. Caldwell that you wrote the letter, that is the question Mr. Berke is talking about.

A. Quite a while afterward.

Q. How long afterwards?

A. About a couple of weeks, I guess.

Q. Who gave you Mr. Brown's address and name? A. I asked Mr. McGuire for it.

Q. Mr. McGuire? A. Yes, sir.

Q. And he gave you the information?

A. That's right.

Q. And then you wrote, and after that there was a meeting in Mr. Finn's office with Mr. Brown and Mr. Penfield? A. That's right. [853]

(Testimony of Ella Herrerias.)

Q. You were given a copy of your affidavit, at that time, by Mr. Brown, were you not?

A. That's right.

Q. In the presence of Mr. Finn, Mr. Brown and Mr. Penfield you read that affidavit word by word throughout the entire length of that, did you not?

Mr. Berke: Now, just a moment, I will object to that as repetitious.

Trial Examiner: Overruled.

Q. (By Mr. Karasiek): Will you——

A. I did.

Q. And when you finished, you said that on page two where you referred to the fact Mrs. Davello and Louis Mahoney was there at the time that Dickerson was there, but that you were not sure that Davello was there or not?

A. No, sir, I wasn't.

Q. And that was what you said, that you wasn't sure after reading the affidavit?

A. Yes, that's right.

Q. And you also told them that on page 7—6, 7 and 8, that you were not sure that the Union people used the statement as used in your affidavit, or instead that the statement was made by Duckworth rather and other persons there, at the meeting, just before the statement the words "trouble-makers, and agitators" rather in regard to Union people? [854]

A. They didn't use the term.

Q. I am asking you if those are the things you said?

A. I don't remember.

(Testimony of Ella Herrerias.)

Q. Just—— A. I don't remember.

Q. You remember that you read these statements in the affidavit in front of those men?

A. I glanced it over, but I wouldn't deny that I read it.

Q. But you read it over, and you read it completely, did you not? A. I tried to.

Q. And you told them that with regard to the statement, did you not? A. Yes.

Mr. Berke: I object.

Trial Examiner: You may have a continuing objection.

Q. (By Mr. Karasick): And then, when you got all through, you said there were two places that you weren't sure about, one was whether Mrs. Davello was there on the day that you thought you saw Mrs. Dickerson plugging and marking them?

A. That's right.

Q. And the second thing was that you were not sure on that meeting on October 15th in the office, you remember that meeting?

A. Yes, sir. [855]

Q. When you discussed the employees who were to be retained, they used the term "Union people", but you were sure that you heard the words "troublemaker and agitator", is that right?

A. I don't remember that at all.

Q. Do you deny that you made that statement?

A. I don't deny it, I don't know—I don't remember.

Q. Now, do I understand your previous testi-

(Testimony of Ella Herrerias.)

mony to be, Mrs. Herrerias, that there are statements in this affidavit that were suggested to you by anyone? A. Yes, sir.

Q. What statements were suggested to you by anyone in this affidavit?

A. When it came down to talking about whether I wouldn't say anything to the Union, Mr. Mathews would ask if it was the Union or wasn't the Union.

Q. And you could answer either yes or no?

A. Yes.

Q. And did he put what you said? A. Yes.

Q. Afterwards, you read it and initialed the changes that he made.

A. I initialed something that he pointed for me, some correction, and I initialed it.

Q. As a matter of fact, one or more of these corrections were made in your own handwriting, didn't you? [856] A. I did not.

Q. You are certain of that, Mrs. Herrerias?

A. I am pretty sure.

Q. Mrs. Herrerias, I ask you to think carefully, to see if you can recall that on the first page of the affidavit as originally drafted, the statement was made that the layoff was about the middle of November of 1953, under the production of one shift that you were talking about, that after you read that you struck out the word "middle" and inserted the word "week" and initialed it?

A. May I see it?

Q. May the record show that I am showing the affidavit that is handwritten to the witness, and ask

(Testimony of Ella Herrerias.)

you if you don't remember the word "middle" which was stricken and initialed in your own handwriting? A. I certainly did not.

Q. You deny that that is your handwriting?

A. Definitely. I never had a pen in my hand that night.

Mr. Berke: That is not the question, that the word "week" is there, the question is that it is her handwriting.

your handwriting? [857] A. That's right.

Mr. Berke: I think if you will recall it, you will agree with me.

Q. (By Mr. Karasick): I will show it to you. Are you also denying that the initials E. H. is not in your handwriting? [857] A. That's right.

Q. As well as the words Ella Herrerias that is on the margin of that page? A. That's right.

Mr. Berke: The witness has not denied that, as I understand it.

Trial Examiner: Counsel showed it to me, I don't know that I can draw any conclusion from it, since I am not a handwriting expert. [858]

* * * * *

Q. (By Mr. Karasick): Do you recall in the presence of Mr. Finn, Mr. Penfield and Mr. Brown on that occasion, that you told them that your husband had asked that you remain neutral about this matter, is that right? A. That's right.

Q. And you agreed that you would, but after that you talked to Mr. Duckworth, and Mr. Grami asked you whether you couldn't give your statement

(Testimony of Ella Herrerias.)

to Mr. Mathews at your home, you didn't want your husband to know that you were talking to the Union, do you recall that? A. No, sir.

Q. Do you deny saying that at that time in front of these three men?

A. I don't remember saying that.

Q. Do you deny saying it?

A. I don't remember.

Q. All right, let us see what else you can or cannot remember about that meeting. Do you remember telling them for that reason, you agreed to go to the Union or talk about going to [859] the Union hall and meeting Mr. Mathews, but that you told your husband that you were going to your friend's house and would be home in approximately an hour? A. Did I tell you my house—

Q. The question is if you didn't make that statement in front of Mr. Brown, Mr. Finn and Mr. Penfield on March 16, 1955?

A. I believe I did.

Q. Now, do you remember further telling them, at that time, Mrs. Herrerias, that while you were talking to Mr. Mathews you began to be worried that your husband would find out you had lied to him about this?

A. That I told Mr. Mathews that?

Q. No, that you told Mr. Brown, Mr. Finn and Mr. Penfield that on that evening, and that you got worried because of the fact that you had told your husband you were going to a friend's house, and that it took longer than you had figured?

(Testimony of Ella Herrerias.)

A. Something to that effect.

Q. In substance, was that what you said?

A. More or less.

Q. Well, is it more or less?

A. I don't remember the exact words.

Q. Is not that substantially correct?

Mr. Berke: I object to the form of the question in asking is that substantially correct. [860]

Trial Examiner: Did you understand what was meant by substantial? In other words, is that the gist of it, is that correct? A. Yes, sir.

Q. (By Mr. Karasick): Is that correct, Mrs. Herrerias? A. Yes, sir.

Q. All right. Now, do you remember also telling them, at that time, and I am talking about March 16th, in front of Mr. Finn, Mr. Brown, Mr. Penfield, do you remember telling these three individuals, at that time, that the reason about your husband's finding out that you were concerned was upsetting to you, and that Mr. Mathews did not act in any improper manner at any time during that interview?

A. Well, it all depends on what you call improper.

Q. I am asking you, Mrs. Herrerias, if you did not make that statement in front of these three men on March 16, 1955, in Mr. Finn's office.

A. He asked me what I meant by acting improper, and I told him it was improper to have sent me there at that time of night.

Q. Let me repeat the question to you, Mrs.

(Testimony of Ella Herrerias.)

Herrerias. I am asking you to affirm or deny under oath, now, whether or not on March 16, 1955, in the office of Attorney Finn, your own attorney, you did not in the presence of Mr. Gerald Brown and Mr. Louis Penfield state in substance and in effect that Mr. Mathews did not act in any improper manner at any time during the interview [861] when that affidavit was taken. I want a yes or no, please. A. Well—

Mr. Berke: Just answer yes or no if you can, or if you cannot.

A. Well, I will say yes.

Q. (By Mr. Karasick): Now is my understanding correct from your testimony that after Mr. Brown and Mr. Penfield left Mr. Finn's office, you discovered something wrong with this affidavit?

A. I told Mr. Finn that it didn't sound true to me, and I said I don't think this is a true copy.

Q. When did you tell Mr. Finn that, Mrs. Herrerias? A. When we were alone.

Q. What date? A. The same evening.

Q. March 16, 1955, is that right?

A. That's right.

Q. Did you tell any representative of the National Labor Relations Board at any time from March 16th to the present date that you had any such doubt at all about the affidavit?

A. Since that meeting?

Q. From that meeting to the present time, have you ever repeated that to any representative of the Board? A. No, sir. [862]

(Testimony of Ella Herrerias.)

Q. Did you tell the company about it?

A. I did.

Q. Who? A. Mr. McGuire.

Q. When? A. About four days later.

Q. What did you tell him?

A. Pardon me, are you referring to Mr. Finn's visit, now?

Q. I am speaking about any time after the meeting with Mr. Penfield and Mr. Brown, and they had left, after you had said that Mr. Mathews had not been guilty of any improper conduct, you discovered that there was something wrong with the affidavit and so told Mr. Finn? A. That's right.

Q. All right. Now, you never told anybody from the Board about it, is that right?

A. Now, which Board are you speaking about?

Q. The National Labor Relations Board.

A. I don't believe I saw another National Labor Relations Board man.

Q. Now, after you made your affidavit, you wrote to Mr. Brown and asked him for it?

A. Yes.

Q. And after you read it a second time, you did not write to Mr. Brown, did you? [863]

A. No, I left that up to my attorney.

Q. And did he do it, so far as you know?

A. I don't know.

Q. But you told him to do this? A. I did.

Q. When? A. When?

Q. Yes.

A. Are you referring to after the affidavit or—

(Testimony of Ella Herrerias.)

Q. I am referring to any time after the meeting on March 16, 1955, in Mr. Finn's office.

Mr. Berke: Are you referring to the fact, Mr. Karasick?

Mr. Karasick: If Counsel wishes to object, I will wait.

Mr. Berke: Well, I submit the statement is vague and indefinite and unintelligible.

Trial Examiner: Read the question.

(Question read.)

Q. (By Mr. Karasick): Do you understand it?

A. I didn't speak to any National Labor Relations Board man at all.

Q. All right, but you did speak to some company representative or another, didn't you?

Mr. Berke: About what?

Trial Examiner: About the discussion in Mr. Finn's office on March 16th. [864]

Q. (By Mr. Karasick): Let us get at that in this way. Mrs. Herrerias, you claim that under oath here that you told your attorney that there was something wrong with your affidavit, after the representatives of the Labor Board left his office on March 16th, is that right? A. That's right.

Q. What exactly did you tell Mr. Finn?

A. I just told him that this didn't sound like my words and it didn't ring true to me at all.

Q. In what respect did you point out that it was not true?

A. I can't pick any particular thing, I took it as a whole.

(Testimony of Ella Herrerias.)

Q. You mean the whole affidavit seemed wrong to you? A. I said it just didn't ring true.

Q. Well, then, did it ring false?

Mr. Berke: I object to that as argumentative.

Mr. Karasick: Well, what does she mean? Since it didn't ring true, it must have been wrong.

Trial Examiner: Will you explain that, please, about what you mean?

A. Well, the wording in some of the statements, were words that I know I didn't say.

Q. (By Mr. Karasick): Now, do you remember what it was? A. There was some change.

Q. Pardon?

A. The changes, like it quoted a change of the rates. [865]

Q. A change from what, Mrs. Herrerias?

A. Well, like furnishing in some detail at the beginning.

Q. What?

A. Such as some questions that he would ask me that I remember that he didn't include and I don't remember exactly what it was, but I know at the time it just didn't seem true to me.

Trial Examiner: I think, at this time, we will recess until 2:15 p.m.

(Whereupon a recess was taken until 2:15 o'clock p.m.) [886]

After Recess

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 2:15 o'clock p.m.)

(Testimony of Ella Herrerias.)

Trial Examiner Hemingway: The hearing is in order.

Q. (By Mr. Karasiek): Mrs. Herrerias, you remember we were last talking about the meeting in your attorney's office, Mr. Finn, on March 16, 1955, between you, Mr. Finn, Regional Director Brown, and Chief Law Officer Penfield of the Labor Board, do you remember it? A. Yes, sir.

Q. Now, with that meeting in mind, do you recall that you told Mr. Finn, Mr. Brown and Mr. Penfield, at that time, that on the night that Mathews wrote this affidavit which you signed, that you never complained to him, to Mathews, at that time, about the amount of time that the interview was taking, do you remember telling them that?

A. No, I don't.

Q. Do you deny that you told them that?

A. I don't deny it, because I don't remember it.

Q. It is true, however, is it not?

A. I don't know.

Q. What I am saying, is that it is true, however, is it not, that on the night of February 9th you did not complain to Mr. Mathews at any time about how much time the interview was taking?

A. Yes, I did, I asked him how long it would take, because I was getting tired.

Q. Well, you didn't make any statement about time, did you?

A. I don't remember if I did or not, but I do know I watched that clock there hour after hour, and I kept watching it, but I don't remember.

(Testimony of Ella Herrerias.)

Q. My question to you, was that you made no statement to Mr. Mathews about the time during the course of that interview?

A. I don't remember.

Mr. Berke: Just a moment, I want to object to the question and move the answer be stricken. It is repetitious in view of the previous answer about complaining to him on one occasion.

Trial Examiner: Well, that was true, I believe, Mr. Karasick.

Mr. Karasick: She said she talked to him on one occasion about being tired.

Trial Examiner: You are talking about a difference between talking and being tired?

Mr. Karasick: That is right.

Trial Examiner: I will let it stand.

Q. (By Mr. Karasick): Now, Mrs. Herrerias, I want your testimony under oath now, as to whether you did or did not—

A. I don't remember.

Mr. Berke: Just a minute, wait until he finishes.

A. I thought he was finished, pardon me.

Mr. Berke: If you can't hear him, say so, but wait until he finishes.

Q. (By Mr. Karasick): I want your testimony under oath here now, Mrs. Herrerias, as to whether you did or whether you did not complain to Mr. Mathews at any time during the interview, when he was taking the affidavit, about the amount of time the interview was taking?

Mr. Berke: Just a moment, I object to his say-

(Testimony of Ella Herrerias.)

ing "I want your testimony under oath now." She has been under oath all the time, and further it is an improper question, and I further object to it as having been asked and answered, and Counsel is engaging in semantics.

Mr. Karasick: I am refreshing her memory.

Trial Examiner: Well, you haven't done it so far.

Q. (By Mr. Karasick): Let me see if I can refresh your memory. Do you remember telling Mr. Penfield, Mr. Brown, and Mr. Finn at the meeting on March 16th of this year that at no time during the interrogation of your affidavit that you complained to Mathews that the interview was taking too long? A. I don't remember.

Q. You do not deny that you made such a statement to these gentlemen?

A. I don't remember making it.

Q. Now, that interview occurred on March 16th of this year, [869] did it not with these three men?

A. I believe it did.

Q. Yet you cannot remember what you told them on that occasion with respect to this matter, is that right?

A. That's right, not that incident, no.

Q. When was it after Mr. Brown and Mr. Penfield left Mr. Finn's office that you first told Mr. Finn that you thought there was something wrong with the affidavit that you had failed to bring out before the three of them?

Mr. Berke: I am going to object to that as twist-

(Testimony of Ella Herrerias.)

ing the evidence, there is no showing that she made any after thought.

Trial Examiner: Well, I don't think that is meant to be technical, you may answer that.

A. Yes, I spoke to him immediately after they left.

Q. (By Mr. Karasick): How long after that?

A. Immediately.

Q. And how long after is immediately? One or two minutes or half an hour?

A. No, as soon as they left the room.

Q. As soon as they left the room?

A. Yes, sir.

Q. Now, why didn't you tell them before they left? A. He didn't ask me to.

Q. Who did not ask you?

A. Mr. Brown just told me to read it. [870]

Q. Who told you to read it?

A. Mr. Brown told me to read it.

Q. Is it your testimony that you were told to read it, and you read it and they left immediately?

A. I told them it wasn't O.K.

Q. And you told them it wasn't O.K.?

A. I told them what the changes were.

Q. And you already, on the record, in your testimony told what those changes were?

A. Yes, that's right.

Q. After those were done, is it your testimony that there was no further discussion and Mr. Brown and Mr. Penfield immediately left?

(Testimony of Ella Herrerias.)

Trial Examiner: Do you understand the question?

A. With Mr. Finn? Do you mean if I had a discussion with Mr. Finn?

Q. (By Mr. Karasick): All right, Mrs. Herrerias, I will give it to you again. You are in Mr. Finn's office with Mr. Brown and Mr. Penfield and Mr. Finn and yourself? A. That's right.

Q. You read the affidavit and you find out some minor particulars in which a change——

Mr. Berke: I am going to object.

Q. (By Mr. Karasick): All right, let me withdraw the question. [871]

You pointed out three particulars in which the affidavit you think is more accurate, is that right?

A. That were more accurate.

Q. You read it over, did you not?

A. Yes, I read it.

Q. At the request of Mr. Finn and Mr. Brown, is that right?

A. At the request of Mr. Brown, yes, sir.

Q. Mr. Finn was there and he agreed didn't he that you should read it?

A. I don't remember if he did or not.

Q. He didn't disagree, did he?

Mr. Berke: I object.

Trial Examiner: Overruled.

Q. (By Mr. Karasick): You read the affidavit, and after you got through reading the affidavit you said there were three minor points that needed to be changed, is not that right?

(Testimony of Ella Herrerias.)

A. I think so, yes.

Q. And other than that, you said the affidavit was correct, did you not?

A. I don't think I said it was correct.

Q. What did you say?

A. I don't remember.

Q. Did you say that it was incorrect in any other respect than the three changes you testified about this morning?

A. Not at that time, no. [872]

Q. And after you got through with that, did Mr. Brown and Mr. Penfield leave the office of Mr. Finn?

A. I don't remember.

Q. You don't remember anything, do you?

A. No.

Mr. Berke: That is not what she testified to.

Trial Examiner: I will let it stand.

Q. (By Mr. Karasick): But you do remember clearly that as soon as Mr. Penfield and Mr. Brown left you told your attorney that there was something wrong with that affidavit, is that so?

Mr. Berke: Just a moment, asked and answered, and that is going clearly beyond the bounds of re-direct examination.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Karasick): Is there any reason, Mrs. Herrerias, that you can give us as to why you cannot recall to your mind that there was anything wrong with the affidavit while Mr. Penfield and Mr. Brown were there, but you do remember only after they had immediately left?

(Testimony of Ella Herrerias.)

A. No, none whatever, I just didn't want to mention anything more about it to them. I thought I would speak to my attorney, because he said I was to make any changes that were necessary.

Q. Who said?

A. That was Mr. Brown, that if there was anything, any altering to be done, Mr. Finn would be——

Q. Mr. Brown said what? [873]

Trial Examiner: Read the answer, please.

(Answer read.)

Trial Examiner: I think that it is not as clear as I first understood. I will permit her to finish it.

A. He told Mr. Finn that if there was any altering or any changes to be made that he could do so.

Q. (By Mr. Karasick): Who could?

A. I understood him to say that any changes to be made or altering to be made in that regard.

Q. Before it was made, before the affidavit was made Mr. Brown said that?

A. No, sir, I think it was after, I think.

Q. Now, you pointed out these things that were wrong, did you not?

A. I—some, yes, sir.

Q. Did you withhold anything from them?

Mr. Berke: Just a moment, Mr. Trial Examiner, I think now we are going into a matter which is an imposition and not proper examination, is repetitious, and it clearly goes beyond proper re-direct examination. We were on this a good part

(Testimony of Ella Herrerias.)

of the forenoon and we've started off again. I understood you, Mr. Trial Examiner, to say that you would permit this briefly. Now, this is certainly more than brief.

Mr. Karasick: Mr. Trial Examiner, this is not of my choosing. If the witness answers the questions, I think I can get through with it. [874]

Trial Examiner: Go ahead.

Q. (By Mr. Karasick): Did I understand that you pointed out some of the things in this affidavit you thought were wrong to these three gentlemen on March 16th, but not all of them?

A. That's right.

Q. Why did you withhold some of them?

A. Because I didn't know I was supposed to.

Q. Why did you think they gave you the affidavit to read, Mrs. Herrerias?

A. I don't know.

Q. Why did you have the meeting in Mr. Finn's office with Mr. Brown and Mr. Penfield?

A. Why, at my husband's request.

Q. At your husband's request?

A. That's right.

Q. And what was your husband requesting, do you know?

A. He just didn't want me to be alone.

Q. Didn't you already testify on this stand, Mrs. Herrerias, that you had the meeting at your attorney's office with those gentlemen for the purpose of determining whether there was anything improper in the way this affidavit was taken?

(Testimony of Ella Herrerias.)

A. I looked——

Mr. Berke: Just a moment, I am going to object, now, Mr. Trial Examiner, I think the bounds of reasonableness have [875] been exceeded, and I submit that the examination is improper.

Trial Examiner: I am going to permit this, I think it is down pretty close to the conclusion, now.

Q. (By Mr. Karasick): I agree with that, Mr. Examiner. Will you answer the question, please?

A. I left that entirely up to my attorney.

* * * * *

Q. (By Mr. Karasick): You are not saying now, are you, that because she was behind the line on the second day was one of the reasons for her discharge? A. Not particularly, no.

Q. What do you mean “not particularly”? Either it was or it was not?

A. No, it was not. [876]

Mr. Karasick: That is all.

Recross Examination

Q. (By Mr. Berke): Mrs. Herrerias, on the night that Mr. Mathews took your affidavit, did he at any time tell you that you did not have to sign it?

A. I don't recall him ever telling me that, no, sir.

Q. Now, Mr. Karasick asked on redirect examination about a statement that you alleged to have made that Mr. Mathews did not act in an improper way. Did you understand what was meant by improper? * * * * *

(Testimony of Ella Herrerias.)

A. Having been alone in there with him, alone with a man I had never met before.

Q. (By Mr. Berke): Is that what you understood? A. That's what I meant. [877]

Q. By the use of improper?

A. That's what I meant.

Q. Now, on the evening of Mrs. Dickerson's discharge, did she deny plugging or decorating the apples when you told her why she was being discharged? A. No, sir, she did not.

Mr. Berke: May I have this marked?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 6 for identification.)

Q. (By Mr. Berke): I show you a document consisting of 4 pages which have been marked as Respondent's Exhibit 6 and ask you if that is in your handwriting? A. That is.

Q. This purports to be—what is it?

A. That is a report on the night that I went—

Q. Is that a report of what—all right, go ahead.

A. That is a letter requesting the return of my statement that I made to Mr. Mathews.

Q. That is addressed to Mr. Gerald A. Brown, Regional Director for the National Labor Relations Board, 630 Sansome St., San Francisco.

I notice it is dated February 18, 1955. Was that letter written on that date? A. It was. [878]

Q. Now, tell us whether or not this is—will you look it over carefully—an exact copy of the letter

(Testimony of Ella Herrerias.)

that you testified you sent to Mr. Brown on that date?

* * * * *

A. It is.

Q. (By Mr. Berke): Did you make it the same day you wrote the original?

A. Word for word, and I made the two at the same time.

Mr. Berke: I offer Respondent's Exhibit 6 in evidence. I will ask leave to withdraw it and make photostatic copies of it. [879]

* * * * *

Q. (By Trial Examiner): Had you completely finished the draft of the letter you wrote to Mr. Brown before you copied it on this Respondent's Exhibit 6?

A. I finished the other first, then I copied this one.

Q. Did you have anyone assist you in reading it to check one against the other.

A. No, sir, that's what I did.

Q. After you finished copying, did you make any effort to go back and check again to see whether or not you had copied it accurately?

A. I believe I did, yes, sir. [880]

* * * * *

Trial Examiner: Respondent's Exhibit 6 is received in [882] evidence subject to duplication of copy, of course. [883]

* * * * *

(Testimony of Ella Herrerias.)

Q. (By Trial Examiner): Let me ask you a few questions about it then.

Will you please describe for me this weekly list that you say you used when you made up a list of the girls that were going to be retained or laid off on October 15th?

A. It is a list—a typewritten list that is made in the office—it is upstairs—of the girls. The weekly list of the girls that work that shift. [887]

Q. During that week?

A. That week, and if there are no changes, I continue using the same list.

Q. I see. That is not a list that you check attendance on? A. No, sir.

Q. That is just a list to show who is employed at the time? A. That's right, alphabetically.

Q. Now, how was it that you were asked to get this list of names for the layoff, were you to check the names of those who were to be laid off, or were you to check the names of those to be retained?

A. If I remember, I think I checked off the girls that were to be laid off. I believe that's the way I done it, and I used the same list.

Q. Now, did you turn that over to somebody or did you retain that list?

A. I turned that back into the office.

Q. Do you know who got possession of it then?

A. No, sir, I don't.

Q. Do you know whether or not the people on your shift who were actually laid off were the same ones who were checked off on your list?

(Testimony of Ella Herrerias.)

A. So far as I know.

Q. That is, did you notice any difference?

A. I did not. [888]

* * * * *

FRANK UNCIANO

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [890]

* * * * *

Direct Examination

Q. (By Mr. Karasick): Mr. Unciano, you worked for Sebastopol Apple Growers Union at one time, did you not? A. Yes, I did.

Q. Did you begin working there in 1951?

A. Yes, sir.

Q. And then, that job lasted how long?

A. For 2 years and a half, I think.

Q. 1953 some time? A. That's right.

Q. What was your job there, doing what?

A. Oh, I was maintenance.

Q. Maintenance? A. Yes.

Q. Then, what did you do, did you quit or were you fired or what? A. Well, I got fired. [891]

Q. Then, did you go back and go to work there again?

A. Last year, 1954, that was in August some time.

Q. When you say you were fired, was it a lay-off in 1953? A. No, sir, he just fired me.

Q. I see. In 1954, you came back to work for the

(Testimony of Frank Unciano.)

company again? A. That's right.

Q. And your job then was what?

A. The same that I had before.

Q. Maintenance? A. Yes, sir.

Q. Were you laid off in the reduction to one shift on October 15, 1954? A. Yes, sir.

Q. Now, do you know Leonard Duckworth?

A. Yes, I know him pretty well.

Q. What was his job at the cannery in 1954?

A. He was the superintendent, I think.

Q. Do you remember any time during 1954 that Mr. Duckworth talked to you about the Sebastopol Cooperative Cannery? A. Yes, I do.

Q. When was that, when did that happen?

A. That was outside the cannery.

Q. Yes, I mean when did it happen?

A. Well, it was in the daytime. [892]

Q. About how long before the layoff of October 15th? A. I think it was about three weeks.

Q. About three weeks? A. Yes.

Q. You say it was outside the cannery?

A. Yes.

Q. Was there anyone else present?

A. No, sir.

Q. Will you tell us on that occasion what Mr. Duckworth said to you about that?

A. Well, I happened to ask him why they were sending off the apples to the Coop.

Q. And that is another cannery?

A. Yes, and he told me he was trying to finish all the apples as fast as they could, because they

(Testimony of Frank Unciano.)

were afraid the Union was going to get in there, and they didn't—they were trying to organize the Union in the cannery.

Mr. Berke: I am sorry, would you read me the answer?

(Answer read.)

Q. (By Mr. Karasick): Now, did he tell you they were trying to organize the Union in the cannery where? A. At Molino.

Q. Molino? A. Yes, sir.

Q. Is the Coop Cannery also known as the [893] Sebastopol Apple Growers— A. Well—

Q. Just a moment, as the Sebastopol Cooperative Cannery? A. That's the name of it.

Q. That is another cannery apart from Molino?

A. That is a part of the Growers Union, but that is a different cannery.

Q. Do you recall anything else Mr. Duckworth said to you at that time?

A. Well, he told me like this, he says he don't want to do business with the Unions, he don't want to sign or whatever happen, that's all he told me.

* * * * *

Trial Examiner: I would like to ask Mr. Unciano, did you ever sign one of those pledge cards for the Union?

A. No, sir.

* * * * *

PAULINE PLOXA

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [907]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Karasick): After you came to work there, did you have any conversation with Mrs. Herrerias about the Union? A. Yes, sir.

Q. How long after you came to work there?

A. Two or three weeks after I came there.

Q. Where did that conversation take place?

A. By telephone.

Q. Did you call her or did she call you?

A. I called her.

Q. Why did you call her?

A. I called her to ask her about these Union activities at the cannery.

Q. Will you tell us what was said at that time?

A. Well, I wanted to be sure that there wasn't going to be any trouble up there between the workers and the cannery or the Union, and all that mixup.

Q. Is this why you called her on the phone?

A. I asked her if she thought there was going to be any trouble up there.

Q. And what reply, if any, did she make?

A. She said that there was going to be no trouble, she said, "Mr. Martini has got everything under control," and I said, [909] "Was it safe for me to report that to Dora Rawles to report to work,"

(Testimony of Pauline Ploxa.)

and she said "Yes," so I said to her—well, where was I—well, we were still talking about this Union and so on, and I said the Union is going to have trouble, and she said, "Don't worry, Mr. Martini has got everything under control, and he is going to have the sheriff up there——"

Mr. Berke: I move to strike that last statement.

Trial Examiner: Strike that.

Q. (By Mr. Karasiek): Try to give us, as well as you can recall, the conversation that went on between the two of you.

A. Talking about the Union, I wanted to be sure that we weren't going to be in trouble over there with our cars. I was worried about that too. And she assured me that there would be no trouble, because Martini had everything under control, and I talked to her about the picket line, and she said, "Don't be afraid, Martini is going to get the sheriff from Santa Rosa and have everything under control," and then she said, "It will be best for you girls to keep away from the Union meeting, because Mr. Martini is going to shut the place down if you go to those meetings."

Q. All right. After you came to work there, did you have any conversation with Mr. Martini about how long the work would last? A. Yes, sir.

Q. Once, or more than once?

A. Twice. [910]

Q. Do you remember when the first of these conversations occurred?

A. About three weeks after I had been there.

(Testimony of Pauline Ploxa.)

Q. Where did it take place?

A. Up on the table of the slicing machine.

Q. During working hours?

A. During working hours.

Q. Was anybody else present at that time?

A. Dora Rawles was present and the other women.

Q. Who was immediately present?

A. Dora Rawles, Mr. Martini and me.

Q. Now, do you recall on that occasion what Mr. Martini said about that?

A. I asked him how long the night shift would last, and he said way into December.

Q. You say there was other conversations with Mr. Martini about the same subject later?

A. Well, yes, sir.

Q. How much later?

A. A week before the layoff.

Q. And the layoff?

A. The layoff was October 15th.

Q. I see. Where were you at that time?

A. Again at the table, I was working on the slicing machine.

Q. Were the same or different persons present on that occasion? [911]

A. The same, Dora and me.

Q. Will you tell us now, if you can recall, what you said and what Mr. Martini said on that occasion?

A. Well, since I wanted to know how long the night shift would work, I again asked him, and he

(Testimony of Pauline Ploxa.)

again reassured me way into December, he said.

Q. Now, other than this telephone call, which you have already related, did you have any further conversation, or did Mrs. Herrerias talk to you out there at any other time about the Union?

A. Yes, sir.

Q. When was that?

A. That was on a Tuesday night.

Q. Do you remember the date?

A. It was Tuesday night at 10:00 p.m., October 12, 1954.

Q. Now, where were you, at the time?

A. I was on the slicing machine.

Q. And anyone else immediately present?

A. Dora was there to my left.

Q. Was this conversation in English?

A. This was in Spanish.

Q. Do you speak and understand Spanish?

A. I speak Spanish.

Q. Does Mrs. Herrerias speak and understand Spanish? [912]

A. She speaks Spanish.

Q. To your knowledge, was there anyone else present who either spoke or understood Spanish?

A. No, sir.

Q. Now, will you tell us, to the best of your recollection, what you said and what Mrs. Herrerias said on that occasion?

A. Ella came up to me at ten o'clock in time, I was watching the clock up there. It was right there, so I always watched the clock up there and she asked me, she said, "Pauline, will you go to

(Testimony of Pauline Ploxa.)

the Union meeting for me as a friend, and because we both speak Spanish, and tell me who from here will be there?" So I said "Why, what are you going to do if I tell you?" And she said, "I want to get their names at least, and give them to Mr. Martini so he can fire them," and I said, "I don't know all these people, what their names are, and I have only been here a little while," and she said, "Well then, you go and take notice of who is there and come back and point them out to me."

Trial Examiner: Would you please read that answer back?

(Answer read.)

Q. (By Mr. Karasick): Now, was that the extent of the conversation at that time, Mrs. Ploxa?

A. Yes, sir.

Q. Did you indicate to Mrs. Herrerias then, whether you would or would not do this? [913]

A. I didn't say anything to her, no, sir.

Q. Now, the next day, was there a Union meeting?

A. The next day, Wednesday, October 13th, there was a Union meeting.

Q. Did you go?

A. I went to the Union meeting.

Q. When was it held for the night shift?

A. At 1:30 in the afternoon.

Q. And after the meeting was over, where did you go?

A. I went home, and then went back to work.

Q. And you punched in at what time?

(Testimony of Pauline Ploxa.)

A. I punched in at 4:00 o'clock that day.

Q. After you came to work and punched in, did Ella Herrerias come and talk to you?

A. She came up to me where I was——

Q. And where were you at the time?

A. I was on the slicing machine.

Q. And was anyone else present?

A. Dora Rawles and the other women.

Q. Was this conversation in English or in Spanish?

A. Well, in Spanish she said, "Come down to the bathroom."

Q. In Spanish?

A. In Spanish. In English, she said "Go to the bathroom."

Q. Did you go?

A. No, sir. I didn't want to go. [914]

Q. Did she speak to you about it later?

A. She left, and about fifteen minutes later, she walked up again and she said to me, "Go to the bathroom, I want to see you," and I said, "I don't want to go down there. We are too flooded up here," and she said, "Let Dora take over," and I said, "I will be there at 4:30."

Q. Did you go down to the bathroom, or ladies' washroom at 4:30?

A. At 4:30, I went there.

Q. Was she there when you got there?

A. Yes, sir.

Q. Did she have a conversation with you?

A. She did.

(Testimony of Pauline Ploxa.)

Q. Was it in English or Spanish?

A. Spanish.

Q. All of the conversation, both of you spoke Spanish? A. Yes, sir.

Q. Now, were other people present, at that time?

A. No, sir.

Q. Were any people in or out of the washroom during the course of the conversation?

A. I don't remember.

Q. So far as you know, did you see any employee in the washroom with you during the course of the conversation, that spoke or understood Spanish, to your knowledge? [915]

A. So far as I know, no, sir.

Q. All right, will you tell us what Mrs. Herrierias said, and what you said on that occasion?

A. Well, Ella followed me right in, and she stood there, and said, "Now, tell me who was at the Union meeting," and I said, "Well, I can't tell you." I told her I didn't know the women. She said, "There were women there?" and I said, "Yes, from the other cannery. She still insisted for me to tell her, you know, if there were some women from here, and I said I don't know, I tell you I don't know. She trots over to the door and opens it——"

Q. Now the door?

A. The door, from where I was standing, it leads out to the floor. The bathroom faces the floor and the women are working there on the belt, you know, sorting.

(Testimony of Pauline Ploxa.)

Q. Could you see the women from the door?

A. I could see a bunch of women there standing sorting. And I turned my back on Ella, and she turned around and she looked me right in the eye, and I hesitated for a moment, and she had the door open, I looked up way over there in the corner, where the peeler machines are, and I see Clara Davello, and I said to her, "She was there, that lady there," and Ella says, "Oh, I don't worry about her, she hates the Union." Along came this little Mary Chapita—

Q. And was that the word you used to describe her on that occasion? [916]

A. Yes, sir.

Q. All right, now, tell us about Mary Chapita.

A. Mary Chapita walked by—maybe to talk to someone, and I told her she was there.

Q. What did you tell her?

A. I don't know Mary Chapita.

Q. And.

A. She said, "Oh, that's all I want to know, what others from here?" And then I remembered that Charlie Ciolino had said the buttons—

Q. Charlie Ciolino was a what?

A. He was a Union man.

Q. And you had seen him at the meeting?

A. I seen him at the meeting, he said that the next day that they were going to be men up there to give buttons to the employees.

Q. All right, what did you say to her?

A. I told her, "Well, you know this man is coming out to the plant to give out the buttons."

(Testimony of Pauline Ploxa.)

Q. And did she reply?

A. Well, that satisfied her. She patted me.

Mr. Berke: I move that that be stricken.

Trial Examiner: Don't say what her thoughts were in the matter. [917]

A. She said, "For that, you will have a job with the company."

Q. She patted your shoulder?

Mr. Berke: Now, wait a minute, I have a motion here as to that previous answer as to satisfied.

Trial Examiner: As to her being satisfied, that may go out.

Q. (By Mr. Karasick): Now, will you tell the Examiner what she did and said after that?

A. She patted me (indicating) and she said, " "

Q. She patted you with her hand in the position you were indicating, is that right? A. Yes, sir.

Q. And what did she say to you?

A. Well, she said, "Don't you worry about it, you and Dora will have a job with the company."

* * * * *

Q. All right. Now, on October 15, 1954, did you punch in ready to go to work that night?

A. Yes, sir.

Q. Were you ready and willing and able to go to work that night? A. Yes, sir.

Q. Did somebody tell you they were going to have a meeting in the warehouse?

A. Yes, sir. [921]

* * * * *

(Testimony of Pauline Ploxa.)

Q. Now, after the meeting was over, did you have a conversation with Martini?

A. I did, outside the warehouse.

Q. Outside the warehouse? A. Yes.

Q. Who else was present?

A. Dora and Ida Fishelson.

Q. She is another employee?

A. She is another employee.

Q. So far as you can recall, what conversation occurred on that occasion?

A. Well, I told Mr. Martini that my name was on the list, but I couldn't—I wouldn't be able to work because I have the kids. [923]

Q. Why couldn't you work because you had the children?

A. Because I had no one to look after them in the daytime, at night my husband looked after them.

Q. Your husband works in the daytime, and when you worked at night, he took care of them?

A. That is true.

Q. All right, will you go on?

A. He said, "Then, I will see you next year," and he said that there was no room in the warehouse. When he said that, Ida Fishelson said that she had a warehouse at Santa Rosa that he could rent, and he said there is more to it than that.

Q. Do you recall now anything else that was said in that conversation?

A. Well, Dora Rawles said did we have to work that night, and he said it was up to us, and he said I would work if I were you, since you are already here.

(Testimony of Pauline Ploxa.)

Q. Did you work? A. I did not work.

Q. Did Dora Rawles work?

A. She did not work.

Q. Do you recall whether, at any time during the meeting or in the conversation with Mr. Martini, if anything else was said and what you related?

A. Well, one day when I was there, I saw a truck getting boxes of apples, and I told— [924]

Q. I am not interested in that. Do you recall whether there was any mention of the word "caps"?

Mr. Berke: I object to that as leading and suggestive.

Trial Examiner: Overruled.

Q. (By Mr. Karasick): Was the word "caps" mentioned? A. Yes, sir.

Q. Tell us as well as you can recall, what was said about that and by whom, if you can?

A. Well, the other fellow said—

Q. Was this in the meeting?

A. Yes, those of you who have aprons and caps that belong to the company, turn them in when the night shift work is over. [925]

* * * * *

Cross Examination

Q. (By Mr. Berke): Did you sign that application? A. Yes, sir.

Q. Do you know whether the cannery is operating fully? A. I beg your pardon?

Q. Do you know whether the cannery is in full operation? A. No, sir.

Q. Now, as I understand it, at this meeting on

(Testimony of Pauline Ploxa.)

October 15th, in the warehouse, that was shortly after you came to work on the night shift? [927]

A. Yes, sir.

Q. And both day and night shifts were present, was that right, Mrs. Ploxa? A. Yes, sir.

Q. And did I understand you to say one of the men, you don't know who, that spoke at the meeting and said, "Those of you who have caps and aprons to turn them in when the night shift was over"? A. Yes, sir.

Q. That is your recollection of what was said?

A. That's right.

Q. Now, after that meeting, you and Dora Rawles and somebody else talked with Mr. Martini?

A. Yes, sir.

Q. And you explained why you couldn't work on that shift? A. Yes, sir.

Q. And then you wanted to know whether you ought to finish out the night shift, is that right?

A. Yes, sir.

Q. And Mr. Martini said to you that he would if he were you because you were already there?

A. Yes, sir.

Q. And did you finish out the night?

A. No, sir.

Q. Did Dora Rawles finish? [928]

A. No, sir.

Q. You both went home then?

A. We both went home.

Q. And now, you first went to work for the company on September 13, 1954?

(Testimony of Pauline Ploxa.)

A. Yes, sir. A Monday.

Q. Monday night? A. Monday night.

Q. On September 13th?

A. On September 13th.

Q. And as I understand it, you signed a pledge card on September 3rd? A. Yes, sir.

Q. That was 10 days before you went to work?

A. Yes, sir.

Q. Where did that take place?

A. The signing of the card?

Q. Yes. A. At the Labor Temple.

Q. I see. Did you know Mr. Grami before you went to work out at Sagu?

A. Yes, I had attended a Union meeting.

Q. You had gone to Union meetings before you went to work at Sagu? A. Yes, sir. [929]

Q. Had you worked in a cannery before in this area? A. Yes, sir.

Q. During 1954? A. Yes, sir.

Q. What cannery?

Mr. Karasick: Objection, as being immaterial and irrelevant.

Trial Examiner: I will permit it.

Q. (By Mr. Berke): What cannery?

A. The Cooperative.

Q. Sebastopol Cooperative? A. Yes, sir.

Q. When was it that you started working, in 1954?

Mr. Karasick: Objection, it is immaterial and irrelevant.

(Testimony of Pauline Ploxa.)

A. It was in the month of July, but I don't know the date.

Q. About the time that cannery opened for that season? A. Yes, sir.

Q. And you worked there until when?

A. Until September 10th.

Q. And did you notify them that you were leaving.

Mr. Karasick: Objection.

Trial Examiner: Overruled.

A. Pardon me?

Q. (By Mr. Berke): Did you notify Sebastopol Cooperative that you were leaving? [930]

A. We didn't have to leave, we were laid off.

Q. Were you laid off or did you quit on the 10th?

A. We were laid off on the 10th of September, sir.

Q. For how long were you laid off?

Mr. Karasick: Objection.

Trial Examiner: Overruled.

A. For the night shift. The night shift was over, it was finished.

Q. The night shift was finished on September 10th? A. Yes, sir.

Q. What was your job over there?

A. Trimmer.

Q. And did they make apple sauce in that cannery too? A. Yes, sir. [931]

* * * * *

Q. (By Mr. Berke): How did you happen to go to Sagu for a job?

(Testimony of Pauline Ploxa.)

A. Because the night work ended so far as I was concerned, and I wanted to make more money.

* * * * *

Q. Did you know Mr. Martini before you went to work at Sagu? A. No, sir.

Q. You did know Mr. Grami, however?

A. I had seen him, but I didn't know him personally. [934]

* * * * *

Q. (By Mr. Berke): Mrs. Ploxa, when you applied for a job at Sagu, where did you go at that time?

A. That very night when we were laid off at the Cooperative, we just started out to Molino, the Sagu, which I know as Molino.

Q. You know Sagu also as Molino?

A. Yes, sir.

Q. Now, you say, "We." Who is "We"?

A. Dora Rawles and me.

Q. Where did you go when you got there?

A. To the plant.

Q. Where in the plant?

A. Where they were working.

Q. Who did you talk to, if anybody, there?

A. I talked to Ella.

Q. How did you know to talk to her?

A. I asked the girls who the floorlady was, and they pointed her out to me.

Q. And did you ask Mrs. Herrerias if there was an opening for you? Was that your conversation with her?

(Testimony of Pauline Ploxa.)

A. When I saw Mrs. Herrerias, I became curious and asked her if she was Spanish, and she said, "Yes," so then we began [935] speaking Spanish. I said——

(Witness commences discourse in Spanish.)

Q. Pardon me, just tell us in English what you said and what she said.

A. Well, I asked her if she had work for us there, that the Cooperative was through with the night shift, so she said, well yes, maybe she would have work there on the following Monday. So in Spanish, we talked on, and I asked her where she was from and we come from the same town, and then I wanted to make sure that we would work there, so I said "Well, now I will have someone to talk to in Spanish," because up to this time I had not had anyone to talk Spanish with. So I said that we would see her and we left.

Q. And did you come back the following week?

A. I came back Saturday, the next day.

Q. Yes?

A. Dora and I came the next day, and there was no one working. There were two men there at the shed who said they worked 12 to 5 on Saturdays. Came back on Monday, which was the 13th, so Ella was putting women on.

Q. Ella hired you then? A. Yes, sir.

Q. And Mrs. Rawles too? A. Yes, sir.

Q. Now, did you ask as a favor from Ella, as to how long you [936] could expect to work if you went to work there? A. No, sir.

(Testimony of Pauline Ploxa.)

Q. You were not concerned about how long the cannery was going to operate, is that it?

A. Yes, sir, I was.

Q. Even though you were concerned, you did not ask Ella about that?

A. Not that night, I didn't.

Q. Now, you worked on the night shift all the time that you worked there last season?

A. Yes, sir.

Q. And Ella was your floor lady up until the time they went over to the single shift, is that right?

A. Yes, sir.

Q. Did you and some other worker get into an argument while you were working there?

A. Yes, sir.

Q. Who was the other person?

A. I don't know her name.

Q. Did you slap that other person?

A. Yes, sir.

Q. And did Ella have to separate you and that other woman?

A. No, sir.

Q. You separated yourselves? [937]

* * * * *

A. Separated myself from the girl. There was no need of separating. I just slapped her once and slapped her twice.

Q. (By Mr. Berke): I see. You slapped her?

A. I did this (indicating).

Mr. Berke: Let the record show that the witness demonstrated with the open palm on both cheeks.

(Testimony of Pauline Ploxa.)

Q. (By Mr. Berke): And did Ella talk to you about that? A. No, sir.

Q. Did she reprimand you for that?

A. No, sir.

Q. She approved of what you did?

A. She didn't say one way or the other. [938]

Q. Now, on Tuesday night of October 12, at 10:00 p.m., when you were watching the clock, is that when Ella came up to you and talked to you in Spanish? A. Yes, sir.

Q. And I think you said something about you were watching the clock? A. Yes.

Q. Why were you watching the clock?

A. I always watch the clock; I watch the clock while I am working.

Q. Did you watch the clock continuously?

A. Continuously. I would be watching the clock and working.

* * * * *

Q. (By Mr. Berke): Now, you called Ella about two or three weeks after going to work, to talk to her about the union at the cannery, you said before? [939] A. Yes, sir.

Q. You said something about you wanted to be sure about something; what did you want to be sure about?

A. Well, I wanted to be sure that there wasn't going to be any trouble up there. It was common talk that Mr. Martini was mad, and he didn't want the union in.

Q. I see. And you expected trouble, did you?

(Testimony of Pauline Ploxa.)

A. Well, certainly.

Q. And Ella told you there wasn't going to be any trouble; is that right? A. Yes, sir.

Q. And you mentioned something to her about a picket line? A. Yes, sir.

Q. Was there common talk about there being a picket line? A. No.

Q. How did you happen to hear about that?

A. I had read in the paper about picket lines.

Q. You read in the paper about picket lines, and did you expect a picket line at Molino, as you called it?

A. No, I didn't expect it; no, sir.

Q. But even though you didn't expect it, you asked Ella about what would happen if there was a picket line? A. Yes.

Q. And you were worried about what, if there was a picket line? [940]

A. I was worried about myself, and my car; I thought maybe there would be trouble.

Q. In what way did you think there would be trouble about yourself and your car?

Mr. Karasick: Is that what you meant?

The Witness: Yes, sir.

Q. (By Mr. Berke): In what way did you think there would be trouble with you and your car?

A. Well, Clara Davello had said that sometimes when union and these establishments could not get together, that the people against the union would upset the cars.

Q. I see.

(Testimony of Pauline Ploxa.)

A. So I called Ella up and asked her about the picket line, and if she knew anything about it.

Q. What did she say?

A. She seemed to be sure of one thing, that Martini had everything under control.

Q. And if there was any violence like that she would have the Sheriff's office to see about it?

A. Yes, sir. [941]

* * * * *

Q. (By Mr. Berke): Now, when was the first time you asked about how long your job was going to last at Sagu?

A. I had been there about three weeks, and I asked Mr. Martini, and he said, "Way into December."

Q. That was after you had been on the job three weeks, from the 10th?

A. Approximately.

Q. Some time in October, was it?

A. It was in October some time.

Q. And then when was the next time you asked?

A. The week before October 13th union meeting.

Q. Where did that take place?

A. There on the table. Mr. Martini came up and talked with me; I asked him then.

Q. You say a week before the union meeting?

A. Approximately; I don't know the date.

Q. What union meeting are you talking about?

A. The union meeting on October 13th; that was on a Wednesday.

(Testimony of Pauline Ploxa.)

Q. Was that a meeting you attended somewhere outside the plant?

A. Of course, sir, right here in the Labor Temple.

Q. Here in Santa Rosa? A. Yes, sir.

Q. Well, after Mr. Martini had told you the first time that there was going to be work for you way into December, why did you, a week later, again ask him about it?

A. Because it was common talk that Mr. Martini was going to shut the place down if the union came in.

Q. Mr. Martini never told you that he was going to shut the place down, did he?

A. No, sir.

Q. You did not ever give Ella Herrerias a list of people who went to the Union meeting, did you?

A. No, sir. [943]

* * * * *

DORA RAWLES

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Karasick): Mrs. Rawles, have you ever worked for the Sebastopol Apple Growers Union? A. Last year was the first time.

Q. And do you remember the date or the approximate date that you worked there?

(Testimony of Dora Rawles.)

A. I started September 13th.

Q. What job did you have?

A. I trimmed, and then I worked on the slicing machine.

Q. What shift? A. Night shift. [951]

Q. Who was your floor lady?

A. Ella Herrerias.

Q. Did you sign a pledge or authorization card, Mrs. Rawles? A. Yes, I did.

Q. Do you remember when you signed it?

A. I don't remember the date.

Q. Will you give us the approximate time, or the time to the best of your recollection?

A. Well, I'd say the last of September.

Q. Mrs. Rawles, I hand you General Counsel's Exhibit 28, and ask you, with the exception of the portion which is in ink on that card, was the card you signed the same? A. It was.

Q. While you worked at the company last year, did you have or were you present at any conversations with Mr. Martini, at which the length of time the night shift would work that season was discussed? A. Yes, I was.

Q. Was there one conversation or more than one conversation?

A. There was two different times.

Q. Directing your attention to the first of these conversations, about when did it occur?

A. Well, the last two weeks of work.

Q. Where were you at the time?

(Testimony of Dora Rawles.)

A. When we were working on the slicing machine, Pauline Ploxa [952] and I.

Q. You are a friend of Pauline Ploxa?

A. Yes, sir.

Q. You have been for a long time?

A. Yes.

Q. You worked together at the plant out there?

A. Yes.

Q. Did you have the same jobs while you were out there last year? A. We did.

Q. At this first conversation, where were you, in the plant? A. Yes.

Q. At work? A. Yes.

Q. Do you remember what you were doing at the time? What sort of job you were doing?

A. We were working on the slicing machine.

Q. Now, was anybody else present besides yourself and Pauline Ploxa?

A. Well, there was other girls down from us.

Q. But any who were immediately connected with or could overhear the conversation that you know of? A. No, sir.

Q. Now, to the best of your recollection, Mrs. Rawles, what was said on that occasion and by whom? [953]

A. Well, Pauline Ploxa asked him about how much longer we would have to work the night shift, and Mr. Martini said we will be working till December.

Q. Now, there was a second such conversation you say? A. Yes, sir.

(Testimony of Dora Rawles.)

Q. When did that conversation occur in relation to the first?

A. That was the following week.

Q. And where were you at the time?

A. At the same place.

Q. Were the same or different persons present?

A. The same.

Q. To the best of your recollection now, will you state what was said and by whom on that occasion?

A. Well, Pauline again asked him about the work, how long the night shift would be working, and he says, "Don't worry, you will be working until December," like that.

Q. Now, had you talked to Pauline about this matter of the length of time the season would last before you talked to Mr. Martini?

A. We had, yes.

Q. Were you interested in the length of time the season would last?

A. Well, I was anxious to work, I wanted to work as long as I could. [954]

* * * * *

Q. (By Mr. Karasick): All right, did you ever receive a Union button while you were working at the plant? A. Yes, I did.

Q. Do you remember when you got it?

A. It was the last of September, to my recollection.

Q. Do you remember when the layoff at the plant occurred? A. The 15th of October.

Q. How—was it before or after the layoff you

(Testimony of Dora Rawles.)

got the button? A. It was before.

Q. How long before?

A. It was the 14th of October.

Q. You were mistaken when you said September?
A. I was. [955]

* * * * *

Q. (By Mr. Karasick): Thank you. Now, after you came to work on the night of October 14th, did Ella Herrerias speak to you about the buttons?

A. Yes, she did.

Q. Now, where were you at the time?

A. We were up working on the slicing machine.

Q. And when you say "we" who do you mean?

A. Pauline Ploxa and myself.

Q. And you worked next to each other? [958]

A. Yes.

Q. I see, and was that true throughout the time you worked there? A. Yes, it was.

Q. Was anyone else present besides the three of you then?

A. Well, like I said before, there was girls working down from us, but not close.

Q. Well, as far as you know, was there anyone present or near you who could hear the conversation? A. No, there was not.

Q. To the best of your recollection now, will you tell us what was said and who said it?

A. Well, Ella came up to where we were working, and said, "Where is your buttons girls." like that, and so we told her they were in our pockets and that was all that was said. [959]

* * * * *

(Testimony of Dora Rawles.)

Q. (By Mr. Karasick): On October 15th, did you punch in at the regular time? A. Yes.

Q. What time was that? A. 4:00 o'clock.

Q. After you punched in, did anybody tell you that there was going to be a meeting?

A. Yes.

Q. Who told you? A. Ella Herrerias.

Q. What time was the meeting itself?

A. I punched in at 4 and then the meeting was right after that. [960]

Q. In the warehouse?

A. In the warehouse, yes, sir.

Q. Did you attend that meeting? A. Yes.

Q. Who all was there when the meeting went on?

A. All the employees and Mr. Caldwell and two other gentlemen.

Q. Mr. Caldwell here at the table?

A. Martini, I am sorry.

Q. Mr. Martini?

A. Yes, and two other gentlemen, which I didn't know.

Q. And you still do not know who those gentlemen were? A. That's right.

Q. You had not seen them before?

A. That's right.

Q. Was Ella Herrerias there so far as you recall? A. Yes, she was there.

Q. Now, was there a list read at that meeting?

A. Yes, there was.

Trial Examiner: A list of names?

(Testimony of Dora Rawles.)

The Witness: Yes.

Q. (By Mr. Karasick): As well as you can recall, will you tell us what was said at that meeting?

A. Well, one of the gentlemen got up and he told us that they were laying off the one shift, because he said there wasn't enough room in the warehouse for the apples, and that's about [961] all I remember—oh, he said there was going to be a list of names read out a little later.

Q. Do you remember anything else that was said at the meeting—withdraw that question for a moment. I show you General Counsel's Exhibit 25, will you look at that letter carefully and tell me whether or not you can recall if that was the letter, or was in substance the letter that was read at that meeting?

A. It was, it is the same one.

Q. Now, can you recall anything else that was said at that meeting, Mrs. Rawles?

A. Well, this first gentleman, as I say, he got up and talked, he told us about the layoff and he said there would be a letter read, and the other gentleman read the letter. I didn't know his name, but he read the list—the other gentleman—I am sorry.

Q. A list of names?

A. He read the list of names and—

Mr. Berke: Excuse me, could we have him identified?

Mr. Karasick: She doesn't know him.

Mr. Berke: I mean, was it the same one that read the letter?

A. No, it wasn't. It was a different one, and he

(Testimony of Dora Rawles.)

said the names that were on the list were to remain and go on the day shift, and the names that weren't on the list were to be fired— [962] let go.

Q. Was your name on the list?

A. Yes, it was.

Q. Was Pauline Ploxa's? A. Yes.

Q. And you heard the two names read among others? A. Yes, we did.

Q. Do you remember anything else that was said at that meeting?

A. And then after that was finished reading the list, Mr. Martini read us the letter that you just showed me.

Q. Now, anything else that you can recall that was said at the meeting?

A. No, I don't remember anything else.

Q. Did anyone at that meeting say that the employees on the night shift whose names were not read would have to work that evening?

A. No, they didn't.

Q. After the meeting was over, did you have a conversation——

Mr. Berke: Just a moment, I am going to ask that that last question and answer be stricken as leading and suggestive.

Trial Examiner: I will deny the motion, especially in view of the answer.

Q. (By Mr. Karasick): After the meeting was over, Mrs. Rawles, did you have a conversation with Mr. Martini? [963] A. Yes, I did.

Q. Where did that occur?

(Testimony of Dora Rawles.)

A. Outside the warehouse.

Q. And who else was present?

A. Pauline Ploxa was there and Ida Fishelson.

Q. And Ida Fishelson was another employee?

A. That's right.

Q. Now, to the best of your recollection, will you tell us what was said on that occasion and who said it?

A. Well, Mr. Martini was standing outside the warehouse talking to another gentleman, and after this man left, we walked up to him, and Pauline again asked him or told him, and said our names were on the list, but she said we can't work days, Mr. Martini, she says, we have children and we aren't able to work days.

Q. Now, why couldn't you work because of children?

A. Well, we'd have to hire a baby sitter and it just wouldn't work out.

Q. What would you do at night?

A. Our husbands took care of the children.

Q. They worked during the day?

A. That's right.

Q. Will you go on about the conversation?

A. So she told him our names were on the list, and that we couldn't work days, and he says, "I am sorry that you can't," [964] he says, "I will see you next year." And then I asked him—before that, Ida Fishelson spoke up and she said, "I have lots of room in Santa Rosa," and said, "I have a warehouse

(Testimony of Dora Rawles.)

that you can rent," and Mr. Martini said, "There was more to it than that," and that was all.

Q. And was anything else said?

A. And I said to him myself "Do I have to work tonight?" and he said, "You can work if you want to, but you don't have to, but if I were you, I would finish the night," like that.

Q. Did you finish the night out?

A. No, I didn't.

Q. What did you do, did you leave then?

A. I went back to the plant.

Q. I mean did you go home after that?

A. Yes, I did. [965]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): As I understand it, on two occasions that you and Mrs. Ploxa inquired of Mr. Martini about how long the night shift would work? That was occasioned by the fact that you and Mrs. Ploxa were anxious—or you wanted to work as long as you could, is that right? A. That's right.

Q. However, you did not finish out the night shift on October [966] 15th, that is right, is it not?

A. I didn't finish it because—

Q. Now, just answer yes or no.

A. No, I didn't.

* * * * *

Q. (By Mr. Berke): Now, when you came to work on the afternoon of October 15th, you say that Ella Herrerias told you that there was going to be a meeting of the employees in the warehouse?

A. Yes, she did.

(Testimony of Dora Rawles.)

Q. Did you also see a notice on the blackboard to that effect? A. No, I never noticed that.

Q. You never noticed? A. No.

Q. You would not say there was not such a notice? A. I never seen it myself.

Q. Now, at that meeting, who was it that spoke first, do you recall?

A. I can't remember the name.

Q. Was it Mr. Martini?

A. I didn't know the other gentleman, Mr. Martini spoke last. [967]

Q. Mr. Martini spoke last?

A. He read the letter.

Q. I see, and one of the other two spoke first?

A. That's right.

Q. And then one of the other two was the next to speak, is that right? A. Yes.

Q. And then Mr. Martini spoke last?

A. Yes.

Q. You are sure of that? A. Yes.

Q. You live next door or pretty close to Pauline Ploxa? A. Across the street.

Q. Have you and she discussed this case?

A. Yes, we have.

Q. Did you get together and discuss the fact that you were going to testify here?

A. Yes, we did.

Q. And did you discuss what you were going to testify about? A. Yes.

Q. Is it Mrs. Rawles?

A. That's right. [968]

* * * * *

(Testimony of Dora Rawles.)

Q. (By Mr. Berke): How did you and Mrs. Ploxa happen to go to [971] SAGU last year to apply for work?

A. We were laid off at the Cooperative, because there was no more work on the night shift, then we went to SAGU.

Q. When were you laid off at the Cooperative?

A. September the 10th. [972]

* * * * *

Q. (By Mr. Berke): Did you apply for employment at the Sebastopol Cooperative Cannery this year? A. Yes, I did. [973]

* * * * *

Q. Have you made application anywhere else for employment? A. Pleasant Hill.

Q. What is Pleasant Hill?

A. That's the name of the drier.

Q. Is that a concern that dries apples?

A. That's right. [974]

* * * * *

Q. (By Mr. Berke): Did you sign the—strike that. I will show you, Mrs. Rawles, General Counsel's Exhibit No. 26, which Mr. Karasick showed you a little while ago, you said this was the application form you filled out at SAGU or Molino?

A. Yes.

Q. Is that the same form that you filled out at Sebastopol Cooperative Cannery? A. Yes.

Q. And what about Pleasant Hill?

A. It is the same one. [975]

* * * * *

CLARENCE E. STOREY

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [980]

* * * * *

The Witness: 169 Burnett Avenue, Sebastopol, California.

Direct Examination

Q. (By Mr. Magor): Are you married, Mr. Storey? A. Yes.

Q. What is your wife's name?

A. Orice Storey.

Q. Were you ever employed by the Sebastopol Apple Growers Union? A. Yes.

Q. When were you first employed by the company? A. September, 1953.

Q. What job did you have at that time?

A. Dumping apples.

Q. How do you refer to the company involved in this proceeding? A. SAGU.

Q. You sometimes refer to it as Molino?

A. Yes.

Q. And if either you or I refer to it either by SAGU or Molino, you are referring to the Sebastopol Apple Growers Union, is that correct?

A. Yes.

Q. The Respondent in this proceeding?

A. Yes. [981]

* * * * *

Q. Will you describe so the Trial Examiner here will understand, what you mean by a "pallet"?

(Testimony of Clarence E. Storey.)

A. A pallet is a slatted rack to stack the boxes on and the fork lift runs underneath, through the slats and picks it up, [990] and it picks up two pallets side by side.

Q. How many boxes on each pallet?

A. Approximately 48.

Q. And what did you do then, what was your job?

A. I would take them off of the pallet and dump them on the belt.

Q. And where was the belt located?

A. I was standing within a foot of it.

Q. Was the belt outside the cannery?

A. The belt was outside the cannery.

Q. What type of belt was it?

A. Just a regular belting.

Q. And would you dump the apples on that belt? A. On that belt.

Q. And where would they go from there?

A. Up into the flume.

Q. And from the flume, where would they go?

A. Down to the peeling line.

Q. And was that flume water? A. Yes.

Q. And were they carried by the water down into the peeling line? A. Yes. [991]

* * * * *

Q. Did you sign any union application or authorization card at any time while you were working at Sagu during the 1954 season? A. Yes.

Q. Do you recall when that was?

A. August the 4th, 1954.

(Testimony of Clarence E. Storey.)

Q. I show you General Counsel's Exhibit No. 28 in evidence. Would you look at that please, sir?

A. Yes.

Q. Now, other than the writing on this document in pen, is that similar to the card you signed?

A. Exactly.

Q. You say you signed it on August 4th?

A. Yes, sir.

Q. Will you tell us when you obtained the card?

A. I obtained the card on August 4th.

Q. And where were you, at the time?

A. In my automobile.

Q. And do you recall what time of day it was?

A. Approximately 10 minutes after 4:00.

Q. Was this before or after work?

A. After work.

Q. Was there anybody else in your automobile at the time? A. Yes. [992]

Q. Who was with you?

A. My wife, Orice, and Margie Byrd.

Q. Is it B-y-r-d? A. Yes.

Q. Where were you going, at the time?

A. We were going home.

Q. Will you tell us if you observed anything unusual, at that time? A. Yes.

Q. Tell us what you observed?

A. I got in my car, the three of us started out of the parking lot into the driveway. There was a man standing on the edge of the highway with some papers in his hand, and Leonard Duckworth and Charles Williams was between me and the man

(Testimony of Clarence E. Storey.)

in the driveway. I got even with him and stopped.

Charlie Williams——

Mr. Berke: Will you hold it just a moment?

Q. (By Mr. Magor): Go ahead.

A. Charlie Williams the night—we referred to him as night superintendent—said, “Storey, do your country a good deed and run over that guy.”

Q. What guy was he referring to?

A. The guy with the cards, and Leonard Duckworth handed two cards in the car. Two pledge cards.

Q. Who did he hand it to? [993]

A. To my wife.

Q. Where was your wife sitting?

A. In the front seat, I was doing the driving.

Q. She was sitting opposite you?

A. Opposite me.

Q. Where was Duckworth at the time?

A. He was standing right by the car.

Q. On what side of the car?

A. On my wife’s side.

Q. You say he handed two cards in the window?

A. Yes.

Q. Did he say anything at the time?

A. No.

Q. Were those—is that the card that you signed?

A. Yes.

Q. Did you sign it on that day?

A. Yes, sir.

Q. That is one of the cards that Mr. Duckworth handed you in the car? A. Yes.

(Testimony of Clarence E. Storey.)

Q. What did you do with the card after you signed it?

A. Put it in the mailbox in Sebastopol.

Q. You sent it to the union?

A. Yes, sent it in to Local 980, Santa Rosa.

Q. You say there was a man standing on the highway outside at [994] the time?

A. Yes, sir.

Q. That was handing out cards or literature?

A. Yes, sir.

Q. Did you know the man, at that time?

A. No, I didn't.

Q. Have you since learned his name?

A. No.

Q. Did you know anybody out there on the highway at the time? A. Yes, sir.

Q. Who was out there?

A. Our union representative.

Q. What was his name?

A. I since learned it was Mr. Bertolucci.

Q. You did not know him at that time?

A. No, I didn't know him.

Q. What was Mr. Bertolucci doing there?

A. Sitting in his automobile.

Q. Do you know what position Mr. Bertolucci occupies?

A. Now, he is President of Local 980.

Q. Now, when Charlie Williams told you to run over that guy over there, what did you say, if anything?

A. I said the guy hasn't bothered me.

(Testimony of Clarence E. Storey.)

Q. After signing the card, Mr. Storey, or after August 4, 1954, what union activity, if any, did you engage in? [995]

A. I attended all the meetings.

Q. Do you recall when it was that you first attended a meeting?

A. Approximately two weeks after I signed the card.

Q. Do you recall where it was that you attended the meeting?

A. At the Labor Temple in Santa Rosa, Local 980.

Q. And would you tell us, to the best of your recollection today, how many union meetings you attended during the time that you worked for Sagu, during the '54 season?

A. I would say at least 10.

Q. Are you on any union committees?

A. Yes.

Q. Do you recall when it was you were on a union committee? A. Not the date.

Q. How long was it after you signed this card on August 4, 1954, approximately?

A. 10 or 12 days.

Q. Were you asked to be on a union committee or elected or appointed or what?

A. We were elected, I guess.

Q. Well, you had a meeting or what?

A. Had a meeting.

Q. Where was the union meeting held?

A. In the Labor Temple in Santa Rosa.

(Testimony of Clarence E. Storey.)

Q. You say you were elected, will you tell us under what circumstances you became a committeeman? [996]

A. Well, we were all in this Labor Temple and each—Mr. Bill Grami wanted to know if we would all serve on the committee and everyone of us agreed.

Q. Will you tell us who else was on the union committee at that time?

A. There was Orice Storey, Eva Lee, Leonard Lee, Leonor Johnson, Lina Ameral, myself. That's the best I can recall, that's it.

Q. Was Lila Layman on it?

A. I don't recall, the first meeting.

Q. Was Mary Russell on that committee?

A. Yes, at the first one.

Q. Was there one committee or more than one union committee?

A. There was only one, at that time.

Q. Were there later committees in addition to that?

A. Later, every meeting we added to it.

Q. What committee was this, the day-shift committee? A. Yes, sir.

Q. Was this for employees at Sebastopol Apple Growers Union? A. Yes, sir.

Q. What was the purpose of the committee?

A. It was to get more people interested in the union.

Q. Now, you say on August 4th, as you were leaving the plant, you saw a person whose name you

(Testimony of Clarence E. Storey.)

did not know and Mr. Bertolucci, whose name you since learned, were out on the highway, is that [997] correct? A. Yes.

Q. After that date, did you see any union representatives out on the highway? A. Yes, sir.

Q. Do you recall when it was that you next observed them?

A. Approximately three weeks.

Q. And did you see them—you say approximately three weeks—did you see them once or more than once? A. More than once.

Q. How often would you see them out there?

A. At noon.

Q. How often? A. Every day.

Q. And at what time of day would you observe them out on the highway?

A. At noon, and at the 4:00 o'clock shift change.

Q. Did you know the names of these representatives that you observed out there? A. Yes.

Q. What were their names?

A. Bill Grami, Charlie Ciolino, Jack Spiro.

Q. How do you spell that last name?

A. I don't know.

Q. What, if anything, were these union representatives doing [998] that you observed?

A. They were talking on the loud speaker.

Q. And how close were they to the company property?

A. They were on the edge of the highway, it could have been a foot from the property.

Q. Now, did you ever have any discussion with

(Testimony of Clarence E. Storey.)

Mr. Martini with respect to the union representatives being out there? A. Yes.

Q. Do you recall where and when it was to the best of your recollection today?

A. The best I recall, early in September.

Q. Where were you at the time?

A. In my position at work dumping apples.

Q. Do you recall what time of day it was?

A. Usually between 10:30 and 11:00.

Q. You say "usually", was there one conversation or more than one conversation?

A. There was more than one.

Q. Now, let us direct your attention to the first one. You say it was sometime early in September?

A. Yes.

Q. Do you recall what time of day it was?

A. Between 10:30 and 11:00.

Q. Was anybody else present at the time?

A. Not engaged in the conversation. [999]

Q. Will you tell us to the best of your recollection today, what was said and who said it?

A. Mr. Martini walked by me where I was working, and said, "Storey, you're slipping, your boys aren't out there yet, what is wrong?" and I would reply, "Give them a minute kind sir, they will be there."

Q. Is that all that was said?

A. In one passing, yes.

Q. When he said "your boys aren't out there yet, they're slipping," what was he referring to to your knowledge?

(Testimony of Clarence E. Storey.)

Trial Examiner: I think you misquoted him, it was, "You're slipping".

Q. (By Mr. Magor): I withdraw the question. When he made this statement, Mr. Martini, to whom was he referring, if you know?

Mr. Berke: Well, wait just a moment. The question is not clear to me, I am going to object on the ground it is vague.

Trial Examiner: Overruled.

Q. (By Mr. Magor): Did you understand the question? A. No.

Q. I will withdraw it.

When Mr. Martini said to you, "Mr. Storey, your boys aren't out there yet," to whom was he referring?

A. To the union officers, Bill Grami, Charlie Ciolino, and Jack Spiro. [1000]

Q. Did Mr. Martini come to talk to you about that on other than this one occasion that you related? A. Several times, yes, sir.

Q. When you say several, how many times did he come and talk to you concerning this?

A. I couldn't give you the exact number, at least one time every day.

Q. And when was the next time, after this first time that you have related?

A. A couple of days after he came right back by.

Q. Was anybody else present at that time?

A. Not in the conversation, no, sir.

Q. What did Mr. Martini say to you?

A. He said, "Mine and Storey's horses don't pull

(Testimony of Clarence E. Storey.)

together, we can't get along." And I momentarily went into a little prayer feeling sorry that I had lost his friendship.

Mr. Berke: I move that be stricken.

Trial Examiner: Did you do that out loud?

The Witness: Yes, sir.

Trial Examiner: Motion denied.

Q. (By Mr. Magor): Did you say anything to him? A. That was all I said.

Q. Now, did you see Mr. Martini after that with regard to the union—or did he say anything with respect to the union officials not being out on the highway? [1001] A. Yes.

Q. Do you recall when that was?

A. The next day or so.

Q. Was anybody else present at the time?

A. Not connected.

Q. Anybody else engaged in the conversation?

A. No.

Q. What did he say at that time?

A. "Storey, your boys are there, I hear them talking."

Q. What did you say?

A. Most times I'd generally laugh.

Mr. Berke: I am going to move that that be stricken, and ask that it be confined to a particular occasion.

Trial Examiner: Yes, please tell only what was said on this particular occasion.

The Witness: All right.

(Testimony of Clarence E. Storey.)

Q. (By Mr. Magor): Can you recall what was said on this particular occasion?

A. He said, "Storey, your boys are out there, I hear them talking." I'd say, "Well, I knew they would be there, figured they would be there to talk to us."

Q. Is that all that was said?

A. That's right.

Q. How many occasions did Mr. Martini come back to where you were working and talk to you about the boys being out on the [1002] highway during the time you worked there?

A. Well, at least eight times, at least that many.

* * * * * [1003]

Q. Do you recall an incident before the time that your wife was discharged, with respect to a group of women wanting to meet with Mr. Martini?

A. Yes.

Q. Do you recall how long it was before your wife was discharged, that that incident took place?

A. The best I recall, September 23.

Q. Were you working on that day?

A. Yes, sir.

Q. And did anything unusual occur on that day?

A. Yes.

Q. What occurred?

A. I was pulled up into the office.

Q. I see. You say you were pulled up into the office, who pulled you up in the office?

A. I went in the cannery to punch in——

Q. What time of day was it?

(Testimony of Clarence E. Storey.)

A. 15 minutes to 12:00.

Q. And did you punch in? A. No.

Q. Tell us what occurred?

A. Leonard Duckworth caught me by the shirt and said, "Martini [1005] wants to see you up in his office."

Q. What did you say to him?

A. I didn't reply, I went up the stairs.

Q. You say you went up the stairs, was anybody with you? A. He was with me.

Q. And you say, "He", whom are you referring to? A. Leonard Duckworth.

Q. Did you go into the office? A. Yes.

Q. What office did you go into?

A. The Cannery Superintendent's office, Leonard Duckworth.

Q. Was anybody in that office at the time?

A. Yes.

Q. Who was there? A. Elmo Martini.

Q. And was Mr. Duckworth present?

A. He came in behind me.

Trial Examiner: Will you repeat that?

The Witness: Duckworth came in behind me.

Q. (By Mr. Magor): Now, it was yourself and Martini and Duckworth? A. Yes.

Q. Was anybody else present? A. No.

Q. Will you now relate the conversation that occurred there, [1006] and will you tell us what was said and who said it?

A. Mr. Martini says, "Storey, I understand you're going for this union," I replied, "Yes." He

(Testimony of Clarence E. Storey.)

said, "Do you know what you are getting into?" I says, "I would like to get more money." He did like this, in this motion (indicating), "You know you won't get as much money as you're getting now, and the women won't get but 90 cents an hour, and you will be assessed, forced to pay big assessments for accidents that happen in the East as far as New York."

Q. You say he made a motion with his finger to the palm of his left hand? A. That's right.

Q. Tell us what else was said?

Trial Examiner: Well actually, he was putting his index finger on his little finger and climbing one finger with each statement thereafter.

Q. (By Mr. Magor): I stand corrected, Mr. Trial Examiner.

What else was said?

A. I guess that's about all.

Q. Have you exhausted your recollection?

A. Yes.

Mr. Berke: Just a moment, he said he guessed that was about all. Now, it seems a little different than exhausting his recollection.

Trial Examiner: If you are making an objection, it is [1007] overruled.

Q. (By Mr. Magor): Was anything said about talking about the union? A. Yes.

Q. All right, will you tell us what was said in that connection?

A. He said that I wasn't to talk about the union

(Testimony of Clarence E. Storey.)

on company time while he was paying me, "But on your own time do as you please."

Q. What did you say, if anything?

A. I didn't reply.

Q. Do you know how long you were in the office at that time? A. Approximately 18 minutes.

Q. Does the whistle blow there at the cannery?

A. Yes.

Q. Do you know what the purpose of blowing the whistle is, to your knowledge? A. Yes.

Q. What is it?

A. One whistle is to get ready, for the women to get punched in and ready to go, and the second is to go to work.

Q. There is more than one whistle?

A. Yes.

Q. Is there more during the noon hour?

A. Yes. [1008]

Q. Now, do you know when the whistle blew, if you know, say so, if you don't know, say so.

A. Approximately seven minutes before noon.

Q. And what is work time for you?

A. My work time is 1:00.

Q. And when does the first whistle blow, do you know?

A. Approximately seven minutes before.

Q. And the second whistle?

A. On the dot, 1:00 o'clock.

Q. Did you hear one whistle blow or more than one? A. Only one.

(Testimony of Clarence E. Storey.)

Q. Were you in the office at the time the whistle blew? A. Yes.

Q. All right, how long after the whistle blew did you leave the office?

A. Approximately four minutes.

Q. And the office you are referring to is?

A. Superintendent's office.

Q. Superintendent's office where you were talking to Mr. Martini? A. Yes.

Q. What time are you supposed to go to work?

A. 15 minutes to 12:00.

Q. And that is why, before punching in, you went to see Mr. Martini? [1009]

A. That's right.

Q. Now, did anybody come in the office during the time you were talking with Mr. Martini?

A. Yes.

Q. Who came in? A. Steve Struempf.

Q. What is his position?

A. Plant Foreman.

Q. Was this during the time you were talking to Mr. Martini? A. Yes.

Q. Was there any conversation, at that time, when Steve Struempf came in?

A. He looked to Leonard Duckworth and said, "The women want to see Martini." Martini said, "I will be down in a minute."

Q. What occurred after you left the office, will you describe that?

A. I walked out on the porch, the balcony, there

(Testimony of Clarence E. Storey.)

was about 75 women gathered around the foot of the stairs.

Q. What did you do then, if anything?

A. I walked on down the stairs, through the crowd. Mr. Martini was standing on the balcony looking down.

Q. What happened then?

A. I walked straight to the time clock and punched in, approximately 15 feet from the foot of the stairs. Mr. Martini then came down the stairs. My wife approached Mr. Martini—— [1010]

Q. That is Orice Storey?

A. Orice Storey, and I heard him say, "No ma'am, I will not."

Q. Did you hear what your wife had to say?

A. I did not.

Q. But you heard him say, "No ma'am, I will not."?

A. "No Ma'am, I will not."

Q. What happened after that?

A. She says, "Back to work girls, back to work girls."

Q. What did you observe then?

A. They all went back to work.

Q. What did you do then?

A. I went back to my position dumping apples.

Q. You went back to work dumping apples, where did you go?

A. To the south end of the cannery outside the cannery.

Q. You say the place that you dumped the apples that come to the cannery?

A. Yes.

(Testimony of Clarence E. Storey.)

Q. And go down the flume to where the girls are peeling and trimming? A. Yes.

Q. Was there any apples coming out there at that time? A. No.

Q. Was there any other apple dumper working that day? A. No.

Q. Were there any apples in the flume when you got out there? [1011] A. No.

Q. Who puts the apples in the flume?

A. I do. * * * * *

Q. Were you paid for the time you were in Mr. Martini's office on that occasion? A. Yes.

* * * * * [1012]

Q. You say the last day your wife worked for the company was on September 25, 1954?

A. Yes.

Q. Did you drive your wife to work on that day?

A. Yes, sir.

Q. In your car? A. Yes.

Q. What time of day did you go to work that day, if you recall?

A. The best I recall, I went to work at 15 minutes until 7:00.

Q. Was that on a Saturday? A. Yes.

Q. Did you work a full day on Saturday?

A. No.

Q. What time did you get off?

A. 12:00 o'clock.

Q. After you were at work on that day, September 25, did you see your wife at any time after that? [1015] A. Yes.

(Testimony of Clarence E. Storey.)

Q. Do you recall when it was, what time it was?

A. Approximately 11:30.

Q. Where did you observe your wife at that time?

A. She walked by, out the cannery door, the south door. I was working in my position. She said, "I punched out, I am sick, I am going to the car."

Q. Was there anyone else present during that time that she said that, who engaged in any conversation? A. No. [1016]

* * * * *

Q. Did you see Mr. Martini on that occasion at all on that day? A. Yes.

Q. Do you recall what time of day it was?

A. Approximately—the best I recall, 15 minutes to 12:00.

Q. Was this before or after you saw your wife?

A. That was after.

Q. Where were you at the time?

A. Standing in my position at the south end of the cannery dumping apples.

Q. Was anybody with Mr. Martini at the time?

A. Not at the time, no.

Q. Did he approach you or what?

A. Yes.

Q. Was anybody else present?

A. They joined in, I say they joined in later.

Q. You mean other people came in later? When you saw him for the first time he was alone?

A. He was alone.

(Testimony of Clarence E. Storey.)

Q. Will you tell us, to the best of your recollection today, what was said at that time, and who said it?

A. He came out of the south cannery door, motioned like this (indicating), "Storey, come here, I want to talk to you."

Q. That motion is with the arm?

A. With his left arm, so we walked about, approximately 25 [1017] feet from my position to the east, out in the street—driveway there—and he said, he asked, "Do you know what your wife is doing?" I said, "No." He says, "She is trying to form a committee on the night shift. I want you to go fire her and get her out of here."

Q. What did you say?

A. I can't repeat the words.

Q. Do you want the ladies to leave the room?

A. Unless they want to hear those words.

Mr. Magor: Would you ask the ladies to leave the room for the purpose of this conversation?

Trial Examiner: Will you please step out in the corridor?

Q. (By Mr. Magor): Tell us now what you said.

A. I did it like this. I said, "That's your fucking job. If you want her fired, you fire her."

Mr. Berke: I didn't understand.

The Witness: I said, "That's your fucking job. If you want her fired, you go fire her.", like that.

Q. (By Mr. Magor): Did you tell him that you only worked there?

(Testimony of Clarence E. Storey.)

A. I said, "I only work here, you are the boss, you do the hiring and firing."

Q. What else occurred then, or what else was said?

A. Leonard Duckworth approached and said, "I have two witnesses to prove that she was trying to form a committee on the [1018] night shift, two girls." Tony Bondi came around the truck from the opposite side and said, "If you have two witnesses, that's enough, I will sign her check."

Mr. Berke: Could I have the reporter read that last part?

(Answer read.)

Q. (By Mr. Magor): What did you say, if anything?

A. I asked, "Was she—" I said, "She is on her own time, she punched out, you told us two days ago that we could do what we wanted on our own time."

Q. Who did you direct that to?

A. Martini.

Q. And what did he say?

A. He said, "Why don't they get their fucking committees and get it over with."

Q. What else did he say? When you told him she was on her own time?

A. He says, "You know, I am the boss, I am the manager, I run this cannery. Why in the hell don't you get Bertolucci and Rhodes to shut the God-damned place down? If you don't I am going to shut the God-damned thing down."

(Testimony of Clarence E. Storey.)

Q. What else was said? Strike that.

When you told Mr. Martini that your wife was on her own time, what did he say to that?

A. He said, "I forbid talking union on cannery property, on cannery property." He repeated the second time. [1019]

Trial Examiner: Who said that?

The Witness: Mr. Martini.

Q. (By Mr. Magor): Is that, to the best of your recollection, the conversation that occurred at that time? A. Yes.

Q. What did they do then?

A. I went back to work. Duckworth—I don't know where Martin and Bondi went, I don't know. Duckworth came back.

Q. All right, just a moment. You don't know where Duckworth and Martini went?

A. No, I don't know.

Q. You refer to Tony Bondi, will you identify him?

A. We refer to him as President of the Board of Directors.

Q. Now, did you see Mr. Duckworth after that?

A. Yes.

Q. Do you recall how long it was after this conversation that you related?

A. Approximately five minutes to 12:00.

Q. Where were you at that time?

A. In my position dumping apples.

Q. All right, did Mr. Duckworth approach you or did you approach him?

(Testimony of Clarence E. Storey.)

A. He approached me.

Q. Do you remember where he came from?

A. He came out of the cannery, came out the south door. [1020]

Q. Was anybody else present at the time?

A. No.

Q. Can you tell us, to the best of your recollection today, what was said and who said it?

A. Mr. Duckworth said, "Tell your wife I will have all of her money for her in a few minutes." I replied, "Okeh."

Q. What was that time?

A. Five minutes to 12:00.

Q. Did you see Mr. Duckworth after this, on that day? A. Not after that.

Q. What did you do then?

A. The whistle blew, I punched out and went to the car, and asked my wife, I said, "Well, I guess they fired you," and she said, "They didn't tell me." and we drove home.

Q. Now, I ask you, Mr. Storey, on that day at any time in the conversation that you have just related with Mr. Martini and Mr. Duckworth and Mr. Bondi were present, whether at that time, did Mr. Martini say to you in words and substance that he had fired your wife? A. No. [1021]

* * * * *

Q. (By Mr. Magor): Mr. Storey, after you and your wife left the plant and went home on September 25, what did your wife do on that day?

A. She went to the doctor.

(Testimony of Clarence E. Storey.)

Q. Do you know whether or not she made any telephone calls to the company on that day after leaving work? A. She called the floorlady.

Q. Which floorlady? A. Edna Hardin.

Q. Did you go back to work the following work day? A. Yes.

Q. That would have been Monday, September 27th? A. Yes.

Q. Did your wife go to work with you on that day? A. No.

Q. Did you see any or talk to any representative of the company with respect to your wife?

A. Yes.

Q. Do you recall who you were talking to?

A. Edna Hardin.

Q. Do you recall what time it was?

A. Approximately 9:30. [1022]

Q. Where were you talking to Edna Hardin?

A. In my position at work.

Q. In your position at work?

A. In my position at work.

Q. Dumping apples? A. Dumping apples.

Q. Was anybody else present at the time?

A. No.

Q. Tell us what was said and who said it?

A. Edna Hardin came up and said, "Here's Mrs. Storey's check, all of Mrs. Storey's money."

I thanked her.

Q. Did she give you a check?

A. She gave it to me.

Q. Was that the only check you got with respect

(Testimony of Clarence E. Storey.)

to your wife? A. At that time.

Q. Did you get one later? A. Later.

Q. When was that?

A. On Wednesday, the following Wednesday.

Q. Who did you get that check from?

A. Mr. Wilson from the main office.

Q. Who is Mr. Wilson?

A. The head bookkeeper over there.

Q. Where did you see Mr. Wilson?

A. In my position at work. He came to me, I came back and I [1023] called him, and I asked him if he would check the books.

Q. He said he would?

A. Yes, and he came back in a few minutes and gave me another check.

Q. Now, getting back to Monday, September 27, did you see your wife at the plant that day at all?

A. Yes.

Q. Do you recall what time of day it was?

A. Between 11:00 and 12:00.

Q. Where did you observe your wife?

A. I was in the parking lot. She came walking up the driveway.

Q. What were you doing in the parking lot?

A. I was eating my lunch.

Q. Was anybody with your wife at the time?

A. No.

Q. Was anybody with you? A. Yes.

Q. What did you do then, you see any representative of the company or talk to any representative of the company? A. Yes.

(Testimony of Clarence E. Storey.)

Q. Who did you talk to? A. Elmo Martini.

Q. Where were you talking to Elmo Martini?

A. Just east of the main entrance to the cannery plant. [1024]

* * * * *

Q. Now, who was with you at the time you were talking to Mr. Martini, who else was present at that time?

A. My wife, Orice Storey, and Margie Byrd.

Q. Was anybody with Mr. Martini at the time?

A. Yes.

Q. Who was with him?

A. The warehouse—packing house superintendent.

Q. Do you know his name?

A. Only his first name.

Q. What is his first name? [1025]

A. Louie.

Q. Did you observe any union official near that locality at that time?

A. They were on the edge of the highway, quite a distance.

Q. Do you know who was there? A. Yes.

Q. Who was there?

A. Bill Grami, Charlie Ciolino.

Q. Now, will you relate to us, to the best of your recollection today, the conversation that occurred with Mr. Martini at that time, and tell us what was said and who said it?

A. We met Mr. Martini, my wife, Margie Byrd, and myself, just outside from the main entrance

(Testimony of Clarence E. Storey.)

of the cannery, on the east side of the cannery in the driveway street, she says, "You're just the man I want to see."

Trial Examiner: Who said that.?

Q. (By Mr. Magor): Who said it, and to whom?

A. My wife, to Mr. Martini. My wife said, "I want to know, am I fired?" He says, "Yes, you are fired." My wife wanted to know what for. He said, "For trying to form a committee on the night shift." She says, "Did you know I was on that committee, Mr. Martini?" Mr. Martini says, "I don't give a darn what committee you're on." He says, "I am not going to back up on my decision, that is final."

Q. Who said that? [1026]

A. Mr. Martini.

Q. What else was said, if anything?

A. The best I recall, that's it.

Q. What happened then?

A. She went—my wife went back toward the highway.

Q. And what did you do?

A. I went to work, punched in and went to work.

* * * * * [1027]

Q. Do you ever wear a union button?

A. Yes.

Q. When you were working on the day shift?

A. Yes.

Q. During the '54 season? A. Yes.

Q. Do you recall when you got a union button?

A. Two days before we were laid off.

Q. Where did you get the button? [1031]

(Testimony of Clarence E. Storey.)

A. In the Labor Temple, Local 980, in Santa Rosa.

Q. What did you do with it after you got it?

A. I got two.

Q. What did you do with it?

A. One on my collar, one on my work aprons.

Q. Did you wear it to work? A. Yes.

* * * * * [1032]

Q. (By Mr. Magor): Mr. Storey, do I understand, that from your position dumping apples, and the apples go in the flume by the water into where the women workers or girls are working at peeling or trimming? A. Yes.

Q. During the time that you were working for Respondent, did you notice anything unusual in the water? A. Yes.

Q. What did you observe? A. Mice.

Q. And when did you observe the mice?

A. 1954, around August the 15th.

Q. And tell us what you observed on that date?

A. Tony Bondi, the President of the Board of Directors, put the mouse in a can and dumped him over in the flume.

Q. When you say, "over in the flume," where?

A. From the can—dumped him out of the can over into the flume.

Q. And where does the flume go?

A. Down inside the cannery to the peeling line.

Q. Were there apples in the water at the time?

A. Yes.

(Testimony of Clarence E. Storey.)

Q. Was the mouse alive or dead or was it a rubber mouse? A. It was a live mouse.

Q. What occurred after that?

A. Screaming took place.

Q. And where did the screaming take place, inside or outside? A. Inside the cannery.

Q. What did you observe, if anything, after that?

A. I ran over to the door, the south door of the cannery, Dorothy Offet, a trimmer, told me there is a rat in here this long (indicating) and measured between the knife and hand like that (indicating).

Trial Examiner: Indicating about eight inches?

The Witness: Yes.

Q. (By Mr. Magor): What else occurred?

A. A lizard.

Q. And when did you observe the lizard?

A. The lizard, that was shortly after that, I couldn't give the exact date.

Q. That was after the incident you just related?

A. It was after the rat.

Q. Do you know who put it in the water?

A. No.

Mr. Berke: Just a moment, there was no showing that this [1034] took place, no evidence showing that it was in the water.

Q. (By Mr. Magor): I will rephrase the question.

Will you tell us what you observed at that time?

A. I didn't know the water lizard was in the flume, I heard an awful screaming inside and then

(Testimony of Clarence E. Storey.)

I really ran to the door, expecting to see something really bad, and the first peeler inside the wall was almost going into fits because she was very upset, screaming and crying, and she said that the lizard had crawled across her hand.

Q. What occurred then, if anything?

A. The floorlady, Edna Hardin, came to me.

Q. Where were you at the time?

A. Dumping apples in my position.

Q. Outside? A. Outside the cannery.

Q. How long after that was it?

A. A couple of minutes.

Q. Was anybody else with Edna Hardin at the time? A. No.

Q. Tell us what was said.

A. She wanted to know if I put the lizard in the water. I told her I didn't have anything to do with it. That's all she said.

Q. Did you talk to anybody else about it?

A. Yes. Mr. Duckworth. [1035]

Q. And when were you talking to him?

A. Just a few minutes after Edna Hardin.

Q. And where were you talking to him?

A. In my same position, outside the cannery.

Q. Was anybody else present? A. No.

Q. Will you tell us what was said and who said it?

A. He said, "Don't let us have any more lizards in the water, or live mice."

Q. What did you say?

(Testimony of Clarence E. Storey.)

A. I didn't—I said, "I didn't put the lizard in the water."

Q. And what else was said, if anything?

A. I didn't say any more.

Q. Now, did you observe—strike that.

Did you yourself put anything in the water?

A. Yes.

Q. What did you put in?

A. My worn out gloves.

Q. When you say "worn out", did you wear gloves when you were working? A. Yes.

Q. Describe them, as "worn out", what do you mean?

A. Well, I wear out a pair of gloves every four days. When they get holes in them, naturally I don't use them any more if you can afford another pair. [1036]

Q. What did you do?

A. I filled my old gloves full of small apples, and laid them like that (indicating) on the belt, like two hands up the belt.

Q. You laid them side by side?

A. Yes, just like that (indicating).

Q. And where did they go from there?

A. Into the flume, down the peeling line. Some of the peelers took them out, I don't know who.

Q. You say, "down the peeling line". What line are you referring to?

A. That is—the apples go down inside the canery to the woman peelers.

Q. Was anything said about that? A. No.

(Testimony of Clarence E. Storey.)

Q. How often did you do it?

A. Once a week.

Q. Were you ever warned or reprimanded by any representative of the company with respect to that?

A. No, sir.

Q. Did you ever talk to any representative of management with respect to that?

A. One representative was standing by the side of me when I laid one pair on there.

Q. Do you recall who that was?

A. Not the date. [1037]

Q. How long was it before you were laid off, if you know?

A. Probably a month and a half.

Q. Who was standing there?

A. Danny Schuster.

Q. What did he say?

A. The warehouse foreman.

Q. What did he say, if anything?

A. He left.

Q. He didn't say anything?

A. He didn't say a word.

Q. Have you ever observed apples that were decorated at all while you were working there?

A. Yes.

Q. Do you recall when it was?

A. Yes.

Q. When was that?

A. About the exact date?

Q. Was it during the '54 season?

A. Yes.

(Testimony of Clarence E. Storey.)

Q. And do you recall when, in relation to the day you were laid off that you first observed them?

A. It was before my wife was fired.

Q. You mean before September 25, sometime?

A. Yes.

Q. How long before that, approximately? [1038]

A. A month.

Q. Where did you observe these apples?

A. Right by where I was working.

Q. You say right by where you were working, can you describe where that was?

A. I was in my position dumping apples outside the cannery. My wife was an inspector on the belt.

Q. Was your wife outside?

A. Yes. She made an apple with a face and set it on the table where I keep my papers, my books. I took my cigarette and put it out and stuck it in his mouth. The next morning when we came to work, it was sitting on the time clock inside the cannery.

Q. Now, you say she made an apple face, can you describe what you mean?

A. She took a knife and made a little 'a capital V' for the nose and a cut like that (indicating) for the mouth and then I made a place to put the cigarette.

Q. You say she made the face, did she remove anything from the apple to make the face?

A. A little speck of the skin.

Q. How about the nose?

(Testimony of Clarence E. Storey.)

A. A little speck for the nose and eyes.

Q. How about the mouth?

A. Was a slit in the skin. [1039]

Q. And when you saw it the next morning, where was it? A. It was on the time clock.

Q. Where is the time clock located?

A. Right beside the ladies' lounge room, the day time clock.

Q. Was anything said to you or in your presence with respect to that? A. No, sir.

Q. To your knowledge, was your wife ever warned or reprimanded by management with respect to that? A. No, sir. [1040]

* * * * *

Cross Examination

Q. (By Mr. Berke): Mr. Storey, did you sign an application at any other cannery?

Mr. Magor: Objected to as incompetent, irrelevant, and immaterial.

Trial Examiner: Overruled.

Q. (By Mr. Berke): What was your answer?

A. Yes.

Q. What other cannery?

A. Oh, O. A. Hallberg & Sons.

Q. Any other? A. Graton.

Q. Any other? A. Manzana.

Q. Any other cannery? A. No.

Q. When did you sign those applications?

Mr. Magor: Same objection.

Trial Examiner: Overruled. You may have a continuing [1047] objection.

(Testimony of Clarence E. Storey.)

A. The same day.

Q. (By Mr. Berke): Same day that you went to SAGU? A. Yes, sir.

Q. About the middle of June?

A. Approximately, the best I recall.

Q. And those two other places, was the application the same or similar to the one Mr. Magor showed you a moment ago, which is General Counsel's Exhibit No. 26? A. Yes.

Q. Pardon? A. Yes. [1048]

* * * * *

Q. Was it part of your job to see to it that the apples were dumped so that there was an even flow into the flume? A. Not particularly.

Q. You could dump all of them as fast as you wanted?

A. You can dump them as fast as you want.

* * * * *

Q. Now, as I understand on the occasion that you related when you and Mrs. Storey were in your car and Mr. Williams and Mr. Duckworth came up, this was shortly after 4:00 o'clock on August 4, 1954, was it? A. Yes.

Q. Mr. Duckworth handed two cards to your wife? A. Yes.

Q. And you say that he didn't say anything? He just gave her the cards, is that right?

A. To the best of my knowledge.

Q. Now, you said something about having been elected as a member of the union committee, 10 or

(Testimony of Clarence E. Storey.)

12 days after signing. Are you sure that you were elected to that committee?

A. I don't know whether you call it elected or the people suggested—suggestions by others. Pick one, pick two, pick [1055] one this way, pick one that way.

Q. Where did they make this suggestion?

A. Mr. Bill Grami out at the Molino plant.

Q. Oh, it was Mr. Grami that suggested you serve on the committee?

A. On this loudspeaker, that we pick four or five good people that would, that we could trust.

Q. I see. Didn't I understand your testimony on direct examination, and correct me if I am wrong, that Mr. Grami wanted to know, "If we all could serve on the committee, and we agreed." Wasn't that your testimony on direct examination?

A. He asked us would we serve on it.

Q. Yes, and you agreed? A. We agreed.

Q. So then, there was not really an election?

A. Not really an election.

Q. Now, referring to the date, that you remember specifically as September 23, did you testify that you were pulled up into the office?

A. Yes.

Q. Did somebody actually pull you up in the office?

A. Didn't pull me up in the stairs, but he caught me by the shirt and said, "Come on, Elmo wants to see you." [1056]

* * * * *

(Testimony of Clarence E. Storey.)

Q. I see. Now in the conversation that took place in the cannery office, among the things that Mr. Martini said to you was something about he didn't want you to do what on his time? Would you explain that please?

A. He didn't want me to talk union on company time.

Q. However, he did say on your own time you could do as you please? A. Right.

Q. As I understand it, you did not make any reply? A. That's right.

Q. Now, you say that while you were in the cannery office in this meeting, you only heard one whistle, is that right? A. Right.

Q. What time was that whistle that you heard?

A. 12:00 o'clock.

Q. Right at noon? The stroke of noon?

A. The work whistle. Our lunch time is from 11:00 to 12:00.

Q. Was this right at the stroke of noon that you heard this whistle? [1057]

A. Right at time to go to work, at noon.

Q. I take it you looked at a clock at the time?

A. I had one on my wrist.

Q. And you looked at your watch and you knew it was exactly 12:00?

A. I know I was due at work then.

Q. You did not hear the previous whistle?

A. I did not.

Q. It may have blown, but you did not hear it?

A. I don't think it could have.

(Testimony of Clarence E. Storey.)

Q. You do not think it could have?

A. It couldn't have.

Q. Now, while you were in this meeting, you say that Mr. Struempf came in and said the women wanted to see Mr. Martini, is that right?

A. Yes.

Q. And was this before or after the whistle blew? A. Shortly after the whistle blew.

Q. About how long after, do you know?

A. I don't—not over a minute or so.

Q. About how long after that was it that Mr. Martini went down to see the women?

A. Approximately three minutes after Steve was in there.

Q. Three minutes after what?

A. After Steve was there. [1058]

Q. And you say there were about how many women standing down there?

A. Approximately 75.

Q. And when you first saw them, where were these 75 women standing?

A. Gathered from the stairs on the south side toward the women's lounge.

Q. And did they remain there all the time that you saw them? A. No.

Q. Where did you next see them?

A. Going to their positions.

Q. Was this after Mrs. Storey had said go back to work? A. Yes, sir.

Q. Up to that point, they remained right there by the stairs? A. Yes, sir.

(Testimony of Clarence E. Storey.)

Q. And did this same group of about 75 women remain there all that time?

A. To the best of my knowledge, yes.

Q. I see. Did this group get into the center of the cannery at all? Near the slicing machines or near the blancher? If you know?

A. To the best of my knowledge, they were close to the blancher.

Q. They were? A. Yes. [1059]

Q. Do you know about how many of them were?

A. I don't.

Q. Did you see the fork lift, at that time?

A. Yes.

Q. What was it doing?

A. Sitting outside the cannery door.

Q. And do you know where outside the cannery door?

A. On the south side of the door, at the main entrance.

Q. While the women were standing there in the cannery, did the forklift come in and begin to operate at all? A. No.

Q. It did not while you watched them until Mrs. Storey said get back to work?

A. I was punching in when she said, "Back to work girls, back to work."

Q. And your back would be toward the group then, when you were punching in? A. No, sir.

Q. And you were able to see what was going on?

A. I was able to see.

Q. You did not see the women in this group hav-

(Testimony of Clarence E. Storey.)

ing to get out of the way because the forklift came in? A. I wouldn't say that.

Q. What would you say, that it did not happen?

A. I say it did not happen. [1060]

Q. When this whistle blows about seven minutes before the noontime, is that an alert whistle to the employees to get ready?

A. To the women to get ready and punch in.

Q. And are the machines running then?

A. No.

Q. While they're punching in? A. No.

Q. When do the machines begin to run?

A. When the last whistle blows.

Q. Right at noon? A. Yes.

* * * * *

Q. Now, on the day that Mrs. Storey was discharged, you say you saw your wife at 11:30 a.m.?

A. Approximately 11:30.

Q. And you saw her from your dumping position? A. I was at my dumping position.

Q. And she told you she had punched out because she was sick, and she was going to the car?

A. Yes. [1061]

Q. Did you see her go to the car?

A. No, I couldn't see the car.

Q. Did you notice where she went?

A. Around the corner, the east corner of the building, southeast corner.

Q. And when she went around that corner, you could not see her after that?

A. I could not see her after that.

(Testimony of Clarence E. Storey.)

Q. Now, you say that on the day, or later that morning of September 25, after the event you just related about your wife, that Mr. Martini came over to you and asked you to come out or away from your dumping position?

A. No, he did not come to me.

Q. He did not come to you?

A. He motioned from the cannery door.

Q. And you walked out about 25 feet, you say, in the street?

A. To the east, and to the street.

Q. What street are you talking about?

A. The main drive between two buildings.

Q. This was on company property?

A. Yes, company property.

Q. And he, after asking you or telling you what your wife was supposed to be doing, he asked you to go and fire her? A. Correct.

Q. Were you a supervisor at that time? [1062]

A. No.

Q. Did you ever hire and fire people while working there? A. No.

Mr. Magor: I move to strike the question and answer on the ground that it is immaterial.

Trial Examiner: Overruled, motion denied.

Q. (By Mr. Berke): Now, the next work day, sometime between 11:00 and 12:00 that day, you say that your wife came down to the cannery?

A. The next work day, yes.

Q. And she came down to see Mr. Martini to find out why she was fired? A. Yes.

(Testimony of Clarence E. Storey.)

Q. She did not come down to ask if she was fired, but she came down to find out why?

A. She came down to ask if she was fired.

Q. If she was fired?

A. If she had been fired.

Q. Did I misunderstand you on direct examination when you testified that she wanted to know why she was fired?

A. She wanted to know if she had been fired.

Q. And in reply to her question whether she was fired, Mr. Martini said the reason you were fired was that you were forming a union committee?

A. On the night shift. [1063]

Q. Had you and your wife or you or your wife talked to any of the union representatives before that day about whether she ought to go down and find out why she was fired?

Mr. Magor: Object on the ground that it is incompetent, irrelevant and immaterial.

Trial Examiner: Overruled.

A. No.

Q. (By Mr. Berke): You had not talked——

A. I had not.

Q. To your knowledge, did Mrs. Storey?

A. To my knowledge, no.

Q. Now, I mean whether she had talked to them face to face or on the telephone?

A. To my knowledge, no.

Q. You say there were present out on the highway, at that occasion, one or more union representatives?

A. Yes.

(Testimony of Clarence E. Storey.)

Q. How did you get to work that morning?

A. I drove my automobile.

Q. Do you know how Mrs. Storey came down?

A. I do not.

Q. To the plant? A. No.

Q. Do you know whether she came down in the car with the union representatives? [1064]

A. No, she didn't so far as I know.

* * * * *

Q. (By Mr. Berke): Do you know a man by the name of Reynolds? A. Yes.

Q. Do you know his first name?

A. Dick, is what we call him.

Q. Did he work at SAGU last year?

A. Yes. [1065]

Q. Wasn't he the man who worked with you at your dumping position at times?

A. He was a lift truck driver, hired as that, hired as a lift truck driver. He hauled my boxes for me.

Q. Would he relieve you at times?

A. For restroom calls, yes.

Q. Would he also trade off with you on your job? A. No.

Q. At no time, did he do that?

A. At no time. We didn't trade off jobs.

Q. Now, as I understand it, you would fill up the flume with the apples and then you would take a five-minute rest, is that right?

Mr. Magor: Just a moment, I object on the ground it is misstating the evidence.

(Testimony of Clarence E. Storey.)

Trial Examiner: No, I will permit it.

A. Not necessarily, not every time.

Q. (By Mr. Berke): Well, when would you do that?

A. If I had to go get a drink of water, drink a coke, or go to the restroom.

Q. Or if you went up to see how the apples were?

A. Walk inside the cannery door to the first peeler and see how the apples were.

Q. Did I understand you to say that those times you would walk up to see how the apples were looking after the trim, was [1066] that your testimony?

A. I could look over into the trim line, see how they looked after they were peeled.

Q. Was that part of your job? A. No.

Q. To see how they looked after they were peeled? A. No.

Q. As a matter of fact, Mr. Storey, you went up to talk to the women, didn't you?

A. Absolutely not.

Q. Did you ever talk to the women?

A. Yes.

Q. While they were working? A. Yes.

* * * * *

Q. On the occasion that you say that Mrs. Storey decorated an apple, which I understood was about a month before she was fired, is that right about that period? A. Yes.

Q. You were working at your dumping position? A. In my dumping position.

(Testimony of Clarence E. Storey.)

Q. What was Mrs. Storey doing there?

A. She was an inspector on the belt, picking out rotten and wormy apples.

Q. And when she made a face out of an apple and put it on the table, you put a cigarette in its mouth?

A. I put my cigarette in its mouth.

Q. Did any supervisor or anybody representing the company see that?

A. Not to my knowledge. [1074]

Q. Was this a good apple or was it not?

A. Yes, a good one.

Q. Was it a peeled apple? A. No.

Q. One that had not yet been peeled, is that right? A. That's right.

Q. Now, you testified that nothing was said about it, is that right?

A. There was nothing said about that apple.

Q. Did Mr. Martini see it?

A. Not to my knowledge.

Q. Mr. Duckworth?

A. Not to my knowledge.

* * * * *

Q. (By Mr. Berke): Will you answer my direct question? Did any of the other supervisors see it?

A. No, not to my knowledge. [1075]

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Redirect Examination * * * * *

Q. (By Mr. Magor): Now, on the day that your wife returned to the cannery, September 27th, did

(Testimony of Clarence E. Storey.)

you at any time after that find out from your wife how she got out to the cannery on that day?

A. Yes.

Q. Do you know how she got out there that day?

A. She told me.

Q. What did she tell you?

A. Angelo Bertolucci brought her out there.

Q. On cross examination, you were asked whether you can dump the apples as fast as possible, do you recall that question? A. Yes.

Q. Did you want to explain your answer in any respect?

A. When you would get the flume filled, I would look in the mirror way up high, looking right down in the water, I could get it right to the top, if you left it go over, the rollers would cut the apples all to pieces and pile them up on the floor, and I would have to stop. [1080-3]

* * * * *

Recross Examination * * * * *

Q. (By Mr. Berke): Now, did you have a mirror out there for the purpose of watching the flow of apples, isn't that right?

A. I watched them pile up in the flume, when they are in the flume. [1080-6]

Q. You have it there for the purpose of watching it pile up?

A. I have it to see when they roll over in the flume.

Q. But the purpose of the mirror is to permit

(Testimony of Clarence E. Storey.)

you to watch so you can see that they do not pile up, is that right?

A. No, to tell me when they are close, so I could dump slower.

Q. And were there times when you were dumping and the flume would fill and they would come out? A. Yes.

Mr. Magor: I object, and it is irrelevant, immaterial, and incompetent to the issues in this case.

Trial Examiner: I will overrule the objection.

Q. (By Mr. Berke): And that happened on more than one occasion, did it not?

Mr. Magor: Same objection.

Trial Examiner: I will give you a continuing objection.

A. Yes.

Q. (By Mr. Berke): Can you tell us about how many times to your recollection that occurred?

A. When I would see an apple cut in half, the first one, I would shut the machine off.

Q. Now, would you please listen to the question? Please read the question, Mr. Reporter.

(Question read.)

A. I don't recall how many times it would happen.

Q. (By Mr. Berke): Half a dozen times?

A. I don't recall.

Q. You don't recall at all?

A. I don't recall how many times a day it would happen.

Q. How many times a day?

(Testimony of Clarence E. Storey.)

A. How many times a day.

Q. It happened a number of times a day, is that right? A. I don't recall.

Q. You don't recall?

A. It wasn't my job to keep the record of how many times I shut the machine off and on.

Q. I asked you whether it happened a number of times a day? A. Yes.

Q. And it happened a number of days, is that right? A. Yes.

* * * * *

Q. (By Trial Examiner): During your cross examination, you testified to certain things that you did. Sometimes when you [1080-8] took a little break between dumping apples, and you made a statement that you would look over the line and see how the apples were. Did you do that for some reason?

A. I would, not in particular, just only that bad bitter pit, and I would see how the apples were piling up on the table, getting ahead of the trimmers all the time. To see how bad they were swamped.

Q. Well, wouldn't the mirror tell you that?

A. This was inside the cannery, I was outside.

Q. Well, would you say that was part of your job to tell how badly they were swamped?

A. No.

Q. Did it help you in any way in performing your job? A. No.

Q. Just a matter of curiosity?

A. That's right. [1080-9]

* * * * *

MARJORIE BYRD

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [1080-12]

* * * * *

Direct Examination

Q. (By Mr. Magor): Were you ever employed by the Sebastopol Apple Growers Union?

A. Yes.

Q. Do you recall when it was that you were first employed by that company?

A. Around September 20th.

Q. Of what year? A. '53.

Mr. Berke: Could you keep your voice up just a little, please?

The Witness: I will try.

Q. (By Mr. Magor): Now, do you know the company as SAGU or Molino? A. Molino.

Q. And if I refer to Molino during the course of your testimony, you understand that I am referring to the Sebastopol Apple Growers Union?

A. Yes.

Q. How long did you work during the 1953 season?

A. I worked until November, I think. [1080-13]

* * * * *

Q. Did you go back to work at all at the company after that, at any time? A. Yes.

Q. Do you recall when that was?

A. The next season.

Q. And do you recall when it was that you went

(Testimony of Marjorie Byrd.)

to work? A. July 15th, I think.

Q. And that is 1954? A. '54. [1080-14]

Q. Which shift were you working on, at that time? A. Day.

Q. Who was your floorlady?

A. Edna Hardin.

Q. What job did you have during the '54 season? A. Trimming.

Q. Did you do anything besides trimming?

A. Yes.

Q. What other jobs did you perform?

A. Slicing and sorting.

Q. Did you sign any union authorization or pledge card at any time during the '54 season while you were working at SAGU? A. Yes.

Q. Do you recall when that was to the best of your recollection?

A. Around August the 4th, I think.

Q. What did you do with the card after you signed it? A. I mailed it.

Q. To whom? A. Sebastopol.

Q. To whom? A. I don't remember that.

Q. Did you mail it to the union? A. Yes.

Q. I show you General Counsel's Exhibit No. 28, in evidence, [1080-15] would you look at that very carefully? Have you had a chance to look at it? A. Yes.

Q. Other than the writing on this card, which is in ink, was the card you signed similar to this?

A. Yes.

Q. Do you know Mrs. Storey? A. Yes.

(Testimony of Marjorie Byrd.)

Q. Orice Storey? A. Yes.

Q. Are you a friend of hers? A. Yes.

Q. Did you know her when she was working at the Sebastopol Apple Growers Union?

A. Yes.

Q. Do you know that she was discharged?

A. Yes.

Q. Do you know of your own recollection, the day she was discharged?

A. Around September 25th.

Q. Did you see her out at the plant at any time after that? A. Yes.

Q. Do you recall when that was?

A. It was a Monday, she was fired on a Saturday, and it was the Monday. [1080-16]

Q. It was the following Monday? A. Yes.

Q. Were you present when any conversation took place between her and any representative of the company? A. Yes.

Q. Do you recall who was present?

A. Mr. Storey and Mrs. Storey and Mr. Martini and another gentleman I don't know his name.

Q. Were you present? A. Yes.

Q. Where did the conversation take place?

A. In front of the main entrance of the cannery.

Q. What time of day was it?

A. Around noon.

Q. Will you tell us to the best of your recollection today, what was said and who said it?

A. Mrs. Storey asked Mr. Martini if she was fired, and he said, "Yes," and she asked for what

(Testimony of Marjorie Byrd.)

reason, and he said she was forming committees on the night shift, and he said he didn't want to hear any more about it.

Trial Examiner: Will you read the answer, I did not hear it.

(Answer read.)

Q. (By Mr. Magor): When Mr. Martini said that she was fired for starting a committee on the night shift, did Mrs. Storey [1080-17] say anything, do you recall? A. For what reason.

Q. What else was said if anything?

A. That's all I can recall.

Q. What did you do then? A. We left.

Q. Did you wear any union button during the time you were working for the company?

A. Yes.

Q. Do you recall when it was that you got the union button?

A. Two days before we were laid off.

Q. Do you recall where you obtained the union button? A. At a union meeting.

Q. I show you General Counsel's Exhibit 31 in evidence, and ask you to look at it carefully. Is the button that you received similar to that?

A. Yes.

Q. How many buttons did you have?

A. Two, I think, two.

Q. Two of them? A. Yes.

Q. Where did you wear them?

A. On my collar.

Q. Did you wear them at work?

(Testimony of Marjorie Byrd.)

A. Yes. [1080-18]

Q. When were you laid off during the '54 season, do you recall the date of that?

A. October 15th.

Q. Was that at a meeting, that you were laid off? A. Yes.

* * * * *

Q. During the time that you were working for the company, did you observe anything unusual about the apples? A. About the apples?

Q. Yes, did you ever notice them decorated or anything? A. Yes.

Mr. Berke: I didn't get that, I object to it as leading and suggestive.

Trial Examiner: Let me hear that question.

(Question read.)

Trial Examiner: Overruled.

Q. (By Mr. Magor): Did you ever decorate apples yourself? A. Yes.

Q. Do you recall when it was? [1080-19]

A. All the time I was there.

Q. All the time you were there? A. Yes.

Q. Would you explain so the Trial Examiner will understand what you did or how you decorated the apples? A. We put faces on them.

Q. And where would you obtain the apples that you put faces on? A. Out of the water.

Q. What job did you hold at the time you did it? A. Trimming.

Q. How would you put the faces on the apples?

A. With the trimming knife.

(Testimony of Marjorie Byrd.)

Q. And tell us exactly what you did.

A. Oh, you make eyes and noses and a mouth on an apple.

Q. How many times did you do that?

A. A lot of times.

Q. Was it a dozen times, half a dozen?

A. A dozen.

Q. And what would you do after you decorated the apple, what would you do with the apple?

A. I sat it above the flume.

Q. And when you say "above the flume," what are you referring to?

A. The flume that carries the apples down and we throw the [1080-20] trimmed apples in.

Q. Did any representative of the company ever speak to you or talk to you about such apples?

A. Yes.

Q. Who was it? A. Mrs. Hardin.

Q. That is Edna Hardin? A. Yes.

Q. Was she the floorlady at the time?

A. Yes.

Q. Can you recall what she said about them?

A. She said they were cute.

Q. Do you recall when that was that she said that?

A. Well, any time she saw them.

Q. Did she say it once or more than once.

A. More than once.

Q. How long was it after you started working for the company in the '54 season that she said this to you?

(Testimony of Marjorie Byrd.)

A. A couple of weeks, I would say.

Q. Was anybody else present at the time?

A. Yes.

Q. Who? A. Mrs. Storey.

Q. Now, did you ever notice anything unusual put in the water at any time? [1080-21]

A. Yes.

Q. What?

A. A rubber mice and balls and apples tied together.

Q. Now, let us take the rubber mice, do you know when that was? A. I don't know when.

Q. Do you know who put it in the water?

A. No, I don't know.

Q. Did you see it in the water?

A. No, I didn't see it in the water.

Q. Did you talk to any representative of the company about it? A. No.

Q. Did you say you saw a rubber ball in the water? A. Yes.

Q. Do you know who put it in there?

A. Mrs. Storey.

Q. Do you recall when that was? A. No.

Q. Was it during the '54 season? A. Yes.

Q. Was anything said by management—any representative of management with respect to the rubber ball? A. No.

Q. And what else did you observe besides the rubber ball?

A. Mrs. Storey cut up an apple one time, and the floorlady [1080-22] said it was cute.

(Testimony of Marjorie Byrd.)

Q. Do you recall when it was?

A. I don't remember the day.

Q. Was it during the '54 season? A. Yes.

Q. What did she do?

A. She made a square apple out of it, the floorlady said it was cute, and Mrs. Storey said that she had done it, and the floorlady said no she didn't do it, we argued with her.

Q. And what happened to the apple?

A. We just run it through the trimmer.

Q. Who did you argue with about it?

A. The floorlady.

Q. And who was the floorlady?

A. Edna Hardin.

Q. Do you know where Mrs. Storey got the apple that she cut?

A. Out of the flume, I imagine.

Q. Will you describe how the apple looked?

A. It was just a cored apple, squared like a block.

Q. Have you ever put a core back in an apple?

A. Yes.

Q. And would you describe for the Trial Examiner what you have done in that respect?

A. Well, we just put the core back in.

Q. Where back in? [1080-23]

A. Back in the core hole.

Q. And where would you get the apple that you did this to? A. It come from the peeler.

Q. What did you do with the apple after you did that? A. Put it in the flume.

(Testimony of Marjorie Byrd.)

Q. And was anything said to you by the management with respect to that? A. No.

Q. How often did you do it?

A. Not too often.

Q. Have you ever observed apples other than the one you have done that with the core, put back in the flume? A. Yes.

Q. Where did you observe it?

A. Going down the flume.

Q. And you say, "Going down the flume," will you explain what you mean by that?

A. The flume that we put the cleaned apples in.

Mr. Berke: Might I suggest that Mr. Magor try to bring his voice up? It sounds like he is getting intimate, and we are having an awful lot of trouble hearing.

Trial Examiner: I do not know about the intimate part, but raise your voice, if you will, Mr. Magor, it makes a good example for the witness, at least.

Mr. Magor: All right, could I have the last question and [1080-24] answer please?

(Question and answer read.)

Q. (By Mr. Magor): Is that the part that you are referring to? A. Yes.

Q. Would you please answer yes or no to a question, rather than nod your head? A. Yes.

Q. And where would they go when you saw them going down the flume, where would the apples go from there?

A. They go into the squirrel cage.

(Testimony of Marjorie Byrd.)

Q. How many apples have you observed with the core inserted in them, during the time you worked for the company in the '54 season?

A. A lot of them.

Q. Have you ever been instructed, or anybody else, any other employee, any employee in your presence instructed or warned by any representative of management with respect to decorating apples or putting cores back into them?

A. No.

Q. During the '54 season, at any time did that occur?

A. Not at any time, I don't recall.

Q. Would you describe how the apples looked that you put a core back in?

A. You just put the core back in the apple.

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): Do you know when it was that you saw Mrs. Storey put the rubber ball in the flume? [1080-27] A. I don't recall.

Q. Can you give us the month?

A. I imagine it was August.

Q. Of last year? A. Yes.

Q. Of 1954? A. Yes.

Q. Now, you say that nothing was said by management about that, is that right?

A. That's right.

Q. Did anyone representing management see her do it to your knowledge? A. No.

(Testimony of Marjorie Byrd.)

Q. Now, you say that you put a core back in an apple or was it more than one apple?

A. More than one apple.

Q. About how many apples did you put the core back into that you recall?

A. I don't recall.

Q. Can you give us some idea?

A. A dozen.

Q. Pardon me? A. A dozen.

Q. Was this all on the same day or over a period of some time?

A. No, all during the season. [1080-28]

Q. A dozen throughout the season?

A. Yes.

Q. And you say that nothing was said to you by management about that? A. No.

Q. To your knowledge, did anyone see you doing that, representing management? A. No.

* * * * *

Q. During 1954, did you see apples with cores in them when they came off the peeling machine?

A. Yes.

Q. Now, it is true, is it not, that apples would come off the peeler, where the peeler had not taken the core out, is that right? A. Yes.

Q. Would that be because the apple was soft, do you know? A. I don't know why.

Q. In any event, you saw a number of apples that came off the peeler, where the peeler had not taken the core out during 1954, is that right?

A. Yes.

(Testimony of Marjorie Byrd.)

Q. Now, on the occasion when you say you were present with Mr. and Mrs. Storey and Mr. Martini and another man, that was when?

A. September 27th.

Q. That was on Monday, was it not?

A. Yes.

Q. And do you remember in that conversation, Mrs. Storey asking Mr. Martini if she was fired for union activities?

A. No, I don't recall her saying that.

Q. You do not recall her saying that?

A. No.

Q. Would you definitely say she did not say that?

A. I would not definitely say that.

Q. You would not definitely say that? [1080-30]

A. No.

Mr. Magor: I am going to move and object to that question, that it assumes facts not in evidence, and I move to strike the answer.

Trial Examiner: I will let it stand.

Q. (By Mr. Berke): What time of day was it that this conversation took place?

A. It was during our lunch hour.

Q. When was your lunch hour?

A. 12, I think.

Q. Pardon me?

A. I think it was at 12:00, I am not sure.

Q. Your lunch hour was right at 12?

A. I don't recall.

Q. Pardon me?

(Testimony of Marjorie Byrd.)

A. I don't recall whether it was 12 or not.

Q. 12:00 till 1:00, was that your lunch hour or when was it? A. I don't recall.

Q. And you don't recall who the other man was that was with Mr. Martini? A. No, I don't.

Q. Have you discussed this case with Mr. and Mrs. Storey? A. Yes.

Q. At their home? A. Yes. [1080-31]

Q. And have you discussed what your testimony was going to be here? A. No.

Q. What did you discuss about this case with them? A. We just talked about it.

Q. Well, what did you talk about?

A. What it was going to be like.

Q. Pardon me?

A. What it was going to be like.

Q. What else? A. Well, that's all.

Q. Well, can you tell me the conversation?

A. No, I don't recall what was said.

Q. You do not recall what was said?

A. No.

Q. Did you talk about it more than once?

A. Yes.

Q. When was the first time?

A. I don't recall.

Q. When was the second time?

A. I don't recall.

Q. When was the last time?

A. I don't recall.

Q. Pardon me? A. I don't know. [1080-32]

(Testimony of Marjorie Byrd.)

Q. You don't know. By the way, whose ball was it that was put in the flume by Mrs. Storey?

A. I don't know.

Q. Do you know where the ball came from?

A. No.

Q. As a trimmer in 1954, your job required you to take cores out of apples, did it not?

A. No.

Q. No? A. You didn't have to.

Q. It was all right for apples—

A. If they accidentally got in the water it was all right.

Q. I don't understand, Mrs. Byrd, if they accidentally got in the water?

A. That was all right, I mean, they never said anything about it.

Q. Did you understand that your job, as a trimmer, did not include picking up apples with cores in them and taking the cores out? A. No.

Q. That was not part of your job?

A. Repeat the question please?

Mr. Berke: Will you read the question?

Mr. Magor: I object to the question as being vague and indefinite and ambiguous. [1080-33]

Mr. Berke: Would you answer, please?

Mr. Magor: Before she answers, I have another objection on the ground it is unintelligible.

Trial Examiner: The witness may answer.

A. No.

Q. (By Mr. Berke): Well, what was your job as a trimmer, as you understood it?

(Testimony of Marjorie Byrd.)

A. To trim the blossom end and the stem end. And any peeling that was left on the apple.

Q. I see, and if you picked up an apple that had a core in it and there was still some peel on the blossom end and stem end all you would do was take the peeling off the stem end and blossom end and let the apple go down the flume with the core in it? A. No.

Q. What would you do with the apple that you picked up to trim that had a core in it?

A. Take it out.

Q. Well then, it was part of your job to take the core out of the apple, was it not?

A. Not specifically.

Q. You mean you could do it when you felt like it?

A. They sometimes still went through with the core.

Q. You mean by that, if it escaped you it went through? A. Yes. [1080-34]

Q. But was it not a part of your job to try to prevent those apples from going by? A. Yes.

Q. And even though it was a part of your job to prevent an apple from going by, with the core in it, some did get by? A. Yes.

* * * * *

ELOYCE MOUNGER

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows: [1080-35]

* * * * *

Direct Examination

Q. (By Mr. Magor): Mrs. Mounger, were you ever employed by the Sebastopol Apple Growers Union? A. Yes.

Q. Do you recall when you were first employed by the company? A. The season of '53.

Q. During the time that you worked for the company, were you married? A. No, sir.

Q. Since leaving, have you become married? A. Yes.

Q. What was your name before you were married? A. McPhee.

Q. How do you spell that?

A. M-c P-h-e-e-.

Q. You say that you were first employed by the company in '53? A. Yes.

Q. Do you recall what month you first went to work for the company? A. July.

Q. What shift were you working on at that time? A. The night shift.

Q. Did you work throughout the '53 season?

A. No, I worked until September, until I went back to school, around September. [1080-36]

Q. About when? A. In September.

Q. Do you recall when in September?

A. Around the 13th.

(Testimony of Eloyce Mounger.)

Q. Did you stop working at that time?

A. Yes.

Q. To return to school, you say? A. Yes.

Q. Did you work during the '54 season at all?

A. Yes.

Q. Can you recall when it was that you went to work during the '54 season?

A. July of '54, the first day they started.

Q. It was the first day they started?

A. Yes.

Q. And can you recall what day it was, to the best of your recollection today? A. July 16th.

Q. What type of crew was working at the time, when you went to work in 1954?

A. A skeleton crew.

Q. And how long did they have a skeleton crew?

A. I started on a Thursday, and on Monday they had a full crew.

Q. During the time that you were employed by the company in [1080-37] the '54 season, did you sign any union authorization or pledge card?

A. Yes.

Q. Do you recall, to the best of your recollection today, the date? A. September 2, 1954.

Q. And what did you do with the card after you signed it?

A. Sent it to the Teamsters Union.

Q. I show you, Mrs. Mounger, an Exhibit in evidence, it is General Counsel's Exhibit No. 28, and ask you to look at that? A. That's right.

(Testimony of Eloyce Mounger.)

Q. Was the card that you signed similar to this card?
A. Yes.

Q. Which shift were you working on in the '54 season?
A. Day shift.

Q. Did you continue to work on the day shift all the time you worked for the company during the '54 season?
A. Yes.

Q. Did you work full time all the time?

A. No.

Q. Did you work part time at any time?

A. After school started in September, I worked part time. [1080-38]

* * * * *

Q. Did you, or were you present at any time when Mr. Martini discussed Mrs. Storey?

A. Yes.

Q. Do you recall when it was?

A. The day she was fired.

Q. The day she was fired? [1080-41]

A. Yes.

Q. Where were you at the time?

A. In the office.

Q. And what office are you referring to?

A. Mr. Martini's.

Q. Was anybody else with you at the time?

A. Joan Chames.

Q. Do you know what day of the week it was?

A. Saturday.

Q. What time of day were you in the office?

A. At noon.

Q. Was anybody else present in the office?

(Testimony of Eloyce Mounger.)

A. The man to whom he was speaking and a couple of secretaries.

Q. Do you know the names of the secretaries?

A. No, I don't.

Q. You say the man to whom he was speaking, do you remember that Mr. Martini was speaking to someone? A. Yes.

Q. Do you know that man's name?

A. No, I don't.

Q. Will you tell us today, to the best of your recollection, what you observed and what you saw and heard on that occasion?

A. Joan and I went into the office and just as we got in the door, Mr. Martini came in in a rush, in a huff, he slammed the [1080-42] little door and he walked over to this man in quite a big hurry, and he started screaming, he said, "That damn Storey woman," he said, she's always talking about the union, he said, "I am going to get rid of her," he said, "I'd rather see the place closed down than see it go union."

Q. Will you describe his voice as he talked?

A. Well——

Mr. Berke: Just a minute, I will object to that as characterization.

Trial Examiner: Well, if she sticks with the physical aspects of it, I will permit it.

Q. (By Mr. Magor): Will you describe it?

A. Well, as he walked in the door, he threw the gates—he slammed it—he walked over, and he was using a high pitch of tone, and he was sort of

(Testimony of Eloyee Mounger.)

going at his hair like that (indicating) and his face was flushed, and he was really going at it——

Mr. Berke: Now just a moment, I object——

Trial Examiner: I will let it stand.

Mr. Berke: Well, his face was flushed, is that part of his voice?

Trial Examiner: Counsel could bring it out by a question, I want the whole story.

Q. (By Mr. Magor): What else was said if anything, at that time?

A. About that time the secretary came over and we got out, [1080-43] because that was just overheard.

Q. I see. A. We left then.

Q. And what was the last day in which you worked, Mrs. Mounger, in 1954?

A. October 15th.

Q. What occurred on the last day you worked for the company, did you work a full shift?

A. No, I wasn't working full shift then.

Q. Was there any meeting held on that day?

A. Yes.

Q. Where was the meeting?

A. It was held in the warehouse.

Q. And how were you informed of the meeting?

A. About 15 minutes before that, we got—some one passed along the word that there was going to be a meeting in the warehouse, and that everybody should be there, and that we got paid for it.

Q. And did you attend that meeting yourself?

A. Yes.

(Testimony of Eloyce Mounger.)

Q. Who else was with you?

A. The night shift, the day shift, what do you mean?

Q. What representatives of the company were there?

A. Mr. Bondi and Martini and Mr. McGuire.

Q. Tell us what occurred. In other words, tell us what was said and who said it? [1080-44]

A. Mr. Bondi got up and he read a little thing about the Board had met and that they didn't have enough apples and that the warehouses were filled to capacity and that they wouldn't be able to go on having two shifts and he thanked us for working, that was all he said. Then Mr. Martini got up and he was talking and he said that Mr. McGuire would read the names that would stay on with the company and they were to report to work Monday morning, and he said if your name wasn't on the list to turn in your caps and aprons and go to the office and you would get your refund of a dollar and a quarter.

Q. What happened then?

A. Then Mr. McGuire read the names.

Q. Was your name read? A. No.

Q. What occurred then?

A. After the meeting, I went up to Mr. McGuire and asked him if my name was on the list, and he said, "I am sure that it was," and I said, "Can I see it?" and he said, "Somebody else has got it."

Q. What happened then, what did you do and what did you observe?

(Testimony of Eloyce Mounger.)

A. Then everybody was standing around and talking, so we went over there, Joan and I——

Q. This is Joan Chames? [1080-45]

A. Yes, and we went over and started talking to them, and everybody was in a confused state——

Mr. Berke: Just a moment, I move that that be stricken as to everybody in a confused state.

Trial Examiner: Strike the confused state.

Q. (By Mr. Magor): Describe what was said and describe what you heard?

A. Well, everybody—well, first of all—it was said at the meeting that everybody that was left to go to work, they were going to choose by seniority, not by previous years, but the people that started there at the beginning of the season, and just about everybody that started at the beginning of the season was laid off, and the ones that had been only working there two or three weeks or a month, were the ones that they kept on, and then a lot of them were night help too and they were confused of whether or not they were supposed to go to work that night, because of the way Mr. Martini said that if your name wasn't on the list to go turn in your aprons and caps so some of them started going off, so some of them asked Mr. McGuire if they were supposed to work, and he said, "Yes," and they started getting around the word that they were supposed to work.

Mr. Berke: I will object to that, Mr. Trial Examiner, and move that all that answer be stricken as unresponsive. It was to tell what was said, and

(Testimony of Eloyce Mounger.)

instead of telling what was said, [1080-46] she related that everybody was confused, and they said, and is clearly not responsive, and I move that it be stricken.

Mr. Magor: I asked what was observed—what was said and what was observed.

Trial Examiner: The motion is denied.

Mr. Berke: You are going to let it stand?

Trial Examiner: Yes, the whole statement.

Q. (By Mr. Magor): Now, did some of the employees leave? A. Yes, the night shift.

Q. They left? A. Yes. [1080-47]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): What were you doing in Mr. Martini's office on the day you say you heard him come in and slam the door and complain about Mrs. Storey? [1080-49]

A. I can't recall what I went in there for, no.

Q. Did you frequently go in there? Into Mr. Martini's office?

A. When I had something to do I went in there.

Q. Did your work take you in there?

A. No, sir.

Q. What did you have to do on that day that you went in there? A. I can't remember.

Q. When was it? A. On September 25th.

Q. You remember that date exactly?

A. Yes.

Q. But you can't remember why you were in there? A. No.

(Testimony of Eloyce Mounger.)

Q. What was Joan Chames doing in there?

A. We went in there together.

Q. And did both of you have some purpose for going in there?

A. Either she went in there with me, or I went in there with her, we were always together.

Q. What did you go in together for?

A. I don't—I told you I don't know.

Q. You started working on July 16, 1954?

A. Yes.

Q. You remember that date specifically?

A. Yes. [1080-50]

* * * * *

Q. At this meeting that took place on October 15th in the warehouse, do you recall who spoke first at that meeting?

A. As far as I can remember, I think Mr. Bondi did. No, Mr. Bondi said Mr. Martini had a letter to read.

Q. So Mr. Martini spoke then?

A. So far as I can remember.

Q. And then Mr. Bondi followed him?

A. Yes.

Q. Who spoke after Mr. Bondi?

A. Well, I think it was Mr. Martini. [1080-53]

Q. You say you think?

A. All I know, that Mr. Bondi read a letter and Mr. Martini was there, and he spoke, and I remember Mr. McGuire speaking, and I mean—to place them in order, I couldn't.

Q. You cannot do that?

A. No.

(Testimony of Eloyce Mounger.)

Q. Did Mr. Bondi read from anything?

A. He read a letter.

Q. He read a letter, and did Mr. Martini read from anything?

A. Not that I can remember, no.

Q. I show you General Counsel's Exhibit 25 in evidence, which is a letter dated October 14, 1954, does that refresh your recollection that Mr. Martini read that letter?

A. Sorry, Mr. Bondi read that.

Q. Mr. Bondi read this? A. Yes.

Q. Are you sure of that?

Mr. Magor: Just a moment, I am going to object on the ground it is argumentative.

Trial Examiner: Overruled.

A. That was almost—

Q. (By Mr. Berke): Just a moment please, I asked you if you were sure that Mr. Bondi read that letter that I have showed you?

A. So far as I can remember. [1080-54]

Q. My direct question is are you sure Mr. Bondi read it? A. I am not sure.

Mr. Magor: I move to strike the answer.

Trial Examiner: Motion denied.

Q. (By Mr. Berke): Now, you say that Mr. Martini said that Mr. McGuire would read the names of those who were to remain and if your name was not on the list to turn in your caps and aprons and you would get a dollar and a quarter?

A. Yes, sir.

(Testimony of Eloyee Mounger.)

Q. That is all Mr. Martini said on that occasion?

Mr. Magor: Just a moment—

Mr. Berke: Do you have an objection, counsel?

Mr. Magor: I withdraw it.

Trial Examiner: Answer the question.

A. His exact words?

Q. (By Mr. Berke): Yes, were those his exact words?

A. So far as I can remember they are.

Q. Those were the exact words, is that right?

Mr. Magor: I objection on the ground that it is argumentative again.

Trial Examiner: I will sustain the objection. It is repetitious.

Q. (By Mr. Berke): Are you telling us, is this your testimony that you remember Mr. Martini's exact words at that meeting on October 15th?

Mr. Magor: I object on the same ground as before, as being argumentative. [1080-55]

Trial Examiner: I will permit that, you may answer it.

A. What was it?

Trial Examiner: Is that your testimony that you remember the exact words?

The Witness: So far as I can remember it is his exact words.

Q. (By Mr. Berke): Now, after the meeting, you say that Mr. McGuire told the people that they were to work that night?

A. He didn't tell a mass of people, no.

(Testimony of Eloyce Mounger.)

Q. Who did he tell?

A. Someone asked, and I don't remember who it was.

Q. Someone in that same group that you said were confused? A. Yes.

Q. How many people were there around at the time? A. I can't give the exact number.

Q. Well approximately? A. 10—12.

Q. I see. Do you know whether they worked the night shift or the day shift?

A. Some of them worked nights and some of them worked days.

Q. And you heard him tell that group that they were to work the night shift?

A. Not that group, somebody.

Q. What person? [1080-56]

A. One person asked.

Q. And that one person was in this group of 10 or 12, is that right? A. Yes. [1080-57]

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ELSIE ELIZABETH DICKERSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Magor): Mrs. Dickerson, were you ever employed by Sebastopol Apple Growers Union, the Respondent herein? A. Yes.

(Testimony of Elsie Elizabeth Dickerson.)

Q. When were you first employed by that Company? A. In '53. [1086]

* * * * *

Q. Now, when you went back to work for the Company in 1954, sometime in July, you say, what job did you have at that time? A. Trimmer.

Q. Who was your floorlady when you started to work? A. Edna Hardin.

Q. Was she your floorlady all the time that you worked for the Company in '54? A. No.

Q. Did you have floorladies other than Edna Hardin?

A. Well, there was Eva Lee for a short period of time, and a girl, lady, by the name of Elicia for a short time, and then Edna—Ella Herrerias.

Q. I see. Was Elicia's last name Unciano?

A. I don't remember her last name.

Q. What is the last day on which you worked for the Company in 1954? A. October 25th.

Q. Now, during the time that you were working for the Company in 1954, did you have the same job? A. No, I was put on the slicer.

Q. You were put on the slicer? A. Yes.

Q. Do you recall when you were put on the slicer? [1089]

A. I don't just remember. It was in September, because I would be called up in there once in a while for a day or two and then sent back to trimming again, and then I was put up there steady.

Q. Steady on the slicer?

A. On the slicer, yes.

(Testimony of Elsie Elizabeth Dickerson.)

Q. What shift were you working?

A. The day shift.

Q. Did you work the same hours on the day shift each day, or did they vary or what?

A. Well, in the beginning we were working seven till four, and then later on we were working eight till five.

Q. Now, did you sign any Union authorization or pledge card during the time you were working?

A. Yes, I did.

Q. During the time you were working for the Company in 1954? A. Yes.

Q. Do you recall when it was that you signed such a pledge card?

A. It was the 4th of August.

Q. 1954? A. 1954. [1090]

* * * * *

Q. Do you recall when you first attended a Union meeting?

A. Well, it could have been in September.

Q. And how many Union meetings did you attend during the time that you worked for the Company?

A. Well, I think I attended all of them that they have had.

Q. Can you tell us approximately how many that would be, just during the time that you were—that you were working for the Company in 1954?

A. Well, it could have been five meetings.

Q. Where were these meetings held, if you can recall?

(Testimony of Elsie Elizabeth Dickerson.)

A. Well, at the Labor Temple in Santa Rosa. One was held at a Japanese church in Sebastopol, or a Japanese building of some sort, I believe it was, and then a little building across from [1092] the co-op in Sebastopol.

Q. Now, during the time that you worked for the Company during 1954, did a lay-off occur?

A. Yes.

Q. Do you recall when that was?

A. October the 15th.

Q. And did you attend that meeting yourself?

A. Yes.

Q. And how were you notified to go to the meeting?

A. I believe it was on the bulletin board in the cannery.

Q. I see. And where was the meeting held?

A. It was held in the old packing shed, across from where we were working.

Q. What time of day was it?

A. Four o'clock.

Q. Did you punch out before going to the meeting or what?

A. Yes, I think — now, I'm a little confused there, whether I came back and punched or whether I punched out when I went down. I don't remember.

Q. You don't recall. Were you notified — Strike that.

Were you laid off at that time, at that meeting?

A. No.

(Testimony of Elsie Elizabeth Dickerson.)

Q. After the meeting, will you tell us what occurred, or what you observed?

A. After the meeting? [1093]

Q. Yes.

A. Well, as I left to go to the car, I noticed three girls standing in a group, and they seemed to be kind of confused from what I gathered as to whether they were to go back to work that night or whether they were to go home.

Mr. Berke: Just a moment. I move that be stricken, "they seemed confused as to whether or not"—

Trial Examiner: I will strike the conclusion.

Q. (By Mr. Magor): Just describe what you saw and what you heard, Mrs. Dickerson, and what was said.

A. Well, they were just standing there, and I don't remember just how I heard it, but it was—they said they didn't know whether to go back to work or to go home.

Q. Do you recall anything else that was said?

A. No, because I was in a hurry to get to the car, to get home.

Q. Do you know their names?

A. No, I don't even know who the girls were.

Q. Did you wear a Union button at any time while you were working for the Company?

A. Yes.

Q. Do you recall when it was that you first started wearing a Union button?

(Testimony of Elsie Elizabeth Dickerson.)

A. Well, we got them on a Wednesday, and I wore mine on Thursday, the following Thursday.

* * * * *

Q. Did you wear your button up until the time that you were discharged, if you recall?

A. I don't recall whether I wore it clear to the time that I was discharged. [1095]

* * * * *

Q. Now, the National Labor Relations Board held an election at the Company on October 19th, 1954. Do you recall that date? A. Yes.

Q. Do you recall the election?

A. Yes. [1096]

* * * * *

Q. I see. Now, you say the last date you worked for the [1097] Company was October 25th, is that correct? A. That's right.

* * * * *

Q. Did anything unusual occur after the time—on the last day that you worked, after—

A. Yes.

Q. —completing work?

A. I was fired.

Q. And tell us what occurred.

A. Well, I was on the slicer, and as I came down from the slicer Ella walked up to me and she put her arm around me and she says, "I have to do something that I don't like to do, I have to let you go," and I said, "Why?" and she said, "You were seen putting—making holes in an apple, and you put a core in it and you put it in the water,

(Testimony of Elsie Elizabeth Dickerson.)
and it got to the office.” And I said, “Yes, I did, but” I said, “don’t worry about it because I expected it.” And she said, “I am glad that you are taking it this way.”

Q. What occurred then? [1098]

A. Well, then I walked around and I met a friend of mine and I stopped to speak to her for a second, and then I went over and punched out.

Q. And who was this friend?

A. Isabel Ameral.

Q. And was Ella Herrerias present when you were talking to Isabel Ameral?

A. Not that I know of.

Q. What did you say, if anything, to Isabel Ameral?

A. I told her that I had just been fired for decorating an apple.

Q. Now, you say that you told Ella Herrerias, “Don’t worry about it, I expected to be fired”?

A. Yes.

Q. Why did you say that?

A. Because I——

Mr. Berke: Just a moment. I am going to object to that.

Trial Examiner: Overruled.

Mr. Magor: Go ahead.

Trial Examiner: Go ahead.

A. (Continuing) ——Because I had been picked as observer, I felt as though I would be fired.

Mr. Berke: I am going to move that that be

(Testimony of Elsie Elizabeth Dickerson.)

stricken, what she felt. There is no basis for it other than a feeling on her part. [1099]

Trial Examiner: I take it that means belief. I will deny the motion. [1100]

* * * * *

Q. (By Mr. Magor): You say you went back to the plant after October 25th, 1954? [1103]

A. Yes.

Q. What was your purpose in going back to the plant?

A. To turn in my cap and apron, and to get my check.

Q. Did you receive your check at that time?

A. Yes, sir.

Q. And how long after October 25th was this, to the best of your recollection today?

A. Well, let's see, must have been around the 30th of October.

Q. Did you see Ella Herrerias at that time?

A. Yes.

Q. Did any conversation take place between the two of you?

A. She just asked me how I was, and I said all right, and she said that my check was in the office. [1104]

* * * * *

Q. (By Mr. Magor): Getting back to the last day that you worked, do you recall the exact date that that was, the day you were discharged?

A. Well, I think it was the 25th of October.

Mr. Magor: I will stipulate to the 25th.

(Testimony of Elsie Elizabeth Dickerson.)

Mr. Berke: Yes, we will stipulate to it.

Trial Examiner: All right.

Q. (By Mr. Magor): Getting back to the last day you worked again, Mrs. Dickerson, what job were you working on on that day?

A. On the slicer.

Q. And did you work anyplace else other than the slicer? A. Trimming.

Q. Trimming. And do you recall when it was that you worked as a trimmer, what time of day?

A. It was after lunch.

Q. After lunch. Did you change places with anybody at that time? [1105] A. Yes.

Q. And do you recall who it was?

A. Ruth Deal.

Q. Ruth Deal. Did you get permission from Mrs. Herrerias to change places? A. Not that day.

Q. Not that day; you just went over and changed places with Miss Deal, or Mrs. Deal?

A. Mrs. Deal, I believe.

Q. Had you worked over in the trimming line prior to that time, while Ella Herrerias was floor-lady? A. Yes.

Q. And when was that, with relation to the last day you worked?

A. Well, that was just, oh, a few days before.

Q. I see. Did you ask for permission at that time? A. Yes.

Q. Who did you ask for permission?

A. Ella Herrerias.

Q. Did she give you permission? A. Yes.

(Testimony of Elsie Elizabeth Dickerson.)

Q. Now, how long after lunch was it that you went over to the trimming section?

A. I believe I went over there directly after lunch.

Q. Did you work there the full afternoon?

A. No. [1106]

Q. How long did you work there?

A. Until around three o'clock. [1107]

* * * * *

Q. I ask you, Mrs. Dickerson, whether on this date you did anything to an apple? A. Yes.

Q. And what time of day was it, to the best of your recollection?

A. Oh, it would be around 2:30.

Q. Was that when you were working on—
What do you call it? The trim line?

A. Trim line.

Q. I see. Was that when you were working on the trim line? A. Yes.

Q. Will you tell us what you did to an apple?

A. Well, I took an apple and I trimmed it first as it should be trimmed, then I put four holes around the apple and I put a [1109] core partially in one of those holes, and I put it in the water.

Q. Did you see what happened to the apple after you did that?

A. No, I dropped it in and let her go.

Q. Where did you obtain the apple that you did this to? A. It came down on our table.

Q. When you speak of coming down on a table,

(Testimony of Elsie Elizabeth Dickerson.)

will you explain that so the Trial Examiner will understand that?

A. Well, the trimmers stand on the other side—the peelers stand on the other side of the trimmers, and they peel, and the apples fall down to the trimmers on a tray, and we trim them there.

Q. How many trimmers are there to a peeler?

A. One.

Q. Did you observe what happened to this apple after that, or did you see it again that day?

A. No.

Q. Was anything said about it up until the time that—— Strike that.

Did anybody say anything about that apple?

A. No.

Q. I show you an apple, Mrs. Dickerson, and I ask you if at my request you fixed that apple in that condition? A. Yes.

Q. Did I ask you to fix the apple similar to the way the apple was on the day that you did that to the apple at work? [1110] A. Yes.

Q. Is that the way it looked?

A. That is the way.

Q. That is the position that the core was after you put it in the apple? A. Yes.

Q. And which part is the top and which the bottom of the apple?

A. This is the top, this is where the core goes through, the core that belongs in it.

Q. I see. Has the core been taken out of the apple? A. Yes.

(Testimony of Elsie Elizabeth Dickerson.)

Q. By the machine? A. Yes.

Q. I see. And then what holes did you put into it?

A. I put this one and this one and this one and this one.

Q. That's four holes in the side of the apple?

A. Yes.

Trial Examiner: Do they go all the way through? I can't see.

The Witness: Yes.

Q. (By Mr. Magor): Where did you obtain the core?

A. On the table where I was working.

Trial Examiner: May I just say for the record that these four holes are really two horizontal cylinder holes, driven [1111] through the apple, is that correct, at right angles to each other?

Mr. Magor: I think that accurately describes it.

Q. (By Mr. Magor): How did you put the holes in there yourself? A. With a knife.

Q. With a knife? A. Yes.

Q. And how far was the core protruding from the apple? A. Just about like that.

Q. That would be about how far? How far would your estimate on that be?

A. About an inch.

Q. About an inch.

Trial Examiner: Are you offering that in evidence?

Q. (By Mr. Magor): Now, how many apples did you do that to on this last day that you worked?

(Testimony of Elsie Elizabeth Dickerson.)

A. One.

Q. One. The day before October 25th, were you working on the trim line? A. The day before?

Q. The day before you were discharged, were you working on the trim line?

A. I don't recall working on it the day before. I worked two days, but I don't remember whether they were in succession or not. [1112]

Q. Well, let's get at it this way. After the lay-off, or during the time Ella Herrerias was there, how often did you work over on the trim line, how many times? A. Twice.

Q. Twice. Now, at any other time while Ella Herrerias was floorlady, did you do anything to the apples similar to the one that you did on this day?

A. No, no.

Q. Where do these apples go after you put them in the water?

A. Well, they go on down the trough until they drop into what is called the squirrel cage, and there they go around in a cylinder and they are washed, and then they go onto another table.

Q. I see. And I believe the squirrel cage is indicated on that diagram, is it not?

A. Right here.

Q. Are there any inspectors located at any point past where you were on that date, October 25th?

A. Any inspectors past where I was?

Q. Yes.

A. Just the girls that were trimming.

Q. Where are they located?

(Testimony of Elsie Elizabeth Dickerson.)

A. On down the line, straight on down from me, from where I was standing. [1113]

Q. Are there any women located past the squirrel cage? A. Yes.

Q. How many were down there on that day, if you know?

A. Well, there must have been three, I believe. I remember two for sure, but it seems to me there were three there.

Q. Do you know their names?

A. Mary Castino, and then I don't remember the other lady. She was a short, heavy-set woman. I don't remember her name.

Q. Don't know her name? A. No.

Q. Now, have you ever seen cores in the water before? A. Yes.

Q. Where do the cores come from?

A. Well, the cores come—when the peelers are peeling, the cores oftentimes drop down along with the apples onto our table.

Q. Does the machine always take the core out?

A. No.

Q. And you say, other than the occasions that you have mentioned, that you were working on the trim line, you worked over on the——

A. Slicer.

Q. ——on the slicer? A. Yes.

Q. Do you recall on that day, October 25th, 1954, what the Company was making at that time? [1114]

A. Slices.

Q. Slices. Will you tell us, or briefly describe,

(Testimony of Elsie Elizabeth Dickerson.)

what your duties were on the slicer during the time you worked on it?

A. Well, each woman has two spindles like that, come up like this.

Q. I see.

A. And the apples come down on this table, peeled and cored, and you drop them over the spindles, one, two.

Q. You drop them over individually, apple by apple?
A. Yes.

Q. One at a time?
A. Yes.

Q. And, during the time that you were working on the slicer, have you ever observed whether or not a core was in the apple?
A. Yes.

Q. What do you do if you see a core in the apple, in the slicer?

A. Well, we remove the core, because it wouldn't go over this spindle if a core is in the apple.

Q. Where do the apples go when you are making slices, from the slicer what happens after that?

A. Well, they drop down below to a little machine that slices them, that has kind of a little hand that hits one, then catches another one and hits it down, keeps them going down. [1115]

Q. I see. And what happens after the apples are sliced?

A. Well, they are dropped into a bin below, which carries them on past, onto a kind of a paddle-wheel that takes them up.

Q. And where does it take them up to?

(Testimony of Elsie Elizabeth Dickerson.)

A. And then it takes them up into a kind of a shaker.

Q. What does the shaker do, if you know?

A. Shakes out seeds or any little pieces, and then it drops onto this table below, where there are women working there to pick out any little bad pieces or seeds or anything like that, any little pieces with green.

Q. And how do they pick them out?

A. With their hands.

Q. Now, prior to the time that you were discharged, before the time you were discharged, were you ever warned at any time about putting a core back in an apple?

A. I never put a core back in an apple before.

Q. Anything ever said to you by management, any warning ever given about not putting a core in an apple? A. No.

Q. During the time that you were working for the Company, Mrs. Dickerson, have you ever observed anything unusual about the apples or anything unusual in the water?

A. Well, once in a while, yes.

Q. What have you observed?

A. Well, I have seen a glove coming down, and I have seen a [1116] real rotten apple coming down, chocolatey color, and I saw an apple with a ribbon on it one day.

Q. And, getting to this apple with the ribbon on it, will you describe what you observed?

A. Well, it was an apple—it was two apples

(Testimony of Elsie Elizabeth Dickerson.)

grown together, and a blue bow was tied around, decorated on it.

Q. Do you recall when this was you observed that?

A. Oh, no, I just can't recall when it was.

Q. Was it during the '54 season? A. Yes.

Q. How long was it before you were laid off, to the best of your recollection?

A. Well, it could have been about three weeks.

Q. Now, you say you observed two apples grown together, with a bow; is that a ribbon or what?

A. Yes, a ribbon.

Q. Do you know who did that? A. Yes.

Q. Who did it? A. I did.

Q. Was any representative of management present or did they say anything to you about it?

A. No.

Mr. Berke: Well, wait a minute. No what? I am going to object to the question, was any management representative [1117] present, did they say anything to you. Those are two questions.

Trial Examiner: Yes, separate it, will you, please.

Q. (By Mr. Magor): Did you talk to any representative of management about that at all?

A. Well, I talked to—

Trial Examiner: Just a minute, until the truck goes by.

A. (Continuing) I talked to Edna Hardin about it, before I put the bow on it.

(Testimony of Elsie Elizabeth Dickerson.)

Q. (By Mr. Magor): Will you tell us what occurred at that time?

A. Well, Edna came up and she was laughing, and she said did you girls do this, and she had this apple in her hand, this double apple. We didn't answer, and she handed it to me. So Isabel Ameral and I took a blue bow that I had on my hair, and tied it around the apple and said we'd send it down to Dorothy, her daughter, who was working on the lower table at that time, so we did.

Q. Anything said about it? A. No.

Q. You say you observed a glove in the water one day? A. Yes.

Q. Tell us what you observed about that.

A. Well, it was just floating down in the unpeeled apples. It went down in the water where we threw our apples.

Q. I see.

A. In the flume, I believe it is called, where the apples come unpeeled. [1118]

Q. Did you ever observe any apples decorated at anytime? A. Yes.

Q. Do you recall when that was?

A. Well, I just—I can't recall just the days, no.

Q. How long was it before you were discharged?

A. Oh, possibly a month.

Q. Will you tell us what you observed?

A. Well, when I came to work one morning, sitting right where I worked was an apple on the flume, and it had a little sharp edge; it was put down there—it was a man decorated.

(Testimony of Elsie Elizabeth Dickerson.)

Q. Will you tell us, describe how it was decorated.

A. Well, he had a little body and eyes and nose and mouth and a cigaret in its mouth, and then I saw apples decorated on the time clock.

Q. Well, let's stick to this one that you saw in the flume. How were the eyes and nose made, if you know?

A. Well, they were just made, cut out with a knife, and the mouth was cut out, and the nose—I don't recall just how it was.

Q. You say you saw one on the time clock?

A. Yes.

Q. Will you describe—— Strike that.

When did you observe that?

A. It was somewhere around that same time.

* * * * *

Q. (By Mr. Magor): During the 1954 season, Mrs. Dickerson, to your knowledge was anything said to any employee for decorating apples by any representative of management?

A. I never heard anyone say anything.

Q. To your knowledge, was any employee told that they would be discharged for decorating apples, during the 1954 season?

A. I never heard of anyone being told.

Mr. Magor: You may examine. [1122]

Cross Examination * * * * *

Q. (By Mr. Berke): All right. Now, at the time you worked on the trimmers, on October 25th,

(Testimony of Elsie Elizabeth Dickerson.)

and the one other occasion before then, were there inspectors down there at the squirrel cage?

A. Were there inspectors?

Q. Yes. A. Yes.

Q. Was Virginia Chicano one of them, do you recall? A. I am quite sure she was.

Q. Do you know who the other two were, of the three you mentioned?

A. Well, Mary Castino was another one—Castiani,—Castino I believe; and I don't recall who else was there.

Q. And you say that was the only time in which you made the core holes in an apple and put a core back into one of the core holes was on this one occasion? A. One occasion.

Q. The 25th? You didn't do it at any other time?

A. I didn't do it at any other time. [1127]

* * * * *

Q. Now, with reference to this apple on which you put a ribbon, that was a freak apple, wasn't it?

A. Yes.

Q. I see. Had the appearance of being a twin apple? A. Yes.

Q. When you took the ribbon out of your hair and tied it on that apple, did Edna Hardin see you, to your knowledge, do it? A. No.

Trial Examiner: Excuse me. Do you mean the first or second time?

Mr. Berke: I understood she put a ribbon on once.

(Testimony of Elsie Elizabeth Dickerson.)

Q. (By Mr. Berke): Was there two times that you put a ribbon on?

A. No, I only put a ribbon on once. Edna Hardin had brought the apple to me.

Q. That was a freak apple that you are talking about? A. Yes.

Q. And Edna Hardin brought that to you?

A. Yes.

Q. And you said, I believe, that she asked what—or something—

A. She asked if we had done that.

Q. Was it after you had put the ribbon on it?

A. It was before I put the ribbon on it.

Q. Before. Did you understand what she meant?

A. Well, I understood—she had brought it down from below, down by the squirrel cage and what I understood, that she meant, was that did we put it in the water and send it down there.

Q. I see; and nobody answered her?

A. No one answered.

Q. Then she gave it to you? A. Yes.

Q. And what you did then was you took a ribbon out of your hair and tied it on? A. Yes.

Q. And you say she did not see you do that?

A. No.

Q. Now, Mrs. Dickerson, with reference to the slicers or slicing units, there is a spindle on the slicing units, is there?

A. Two spindles to each girl.

Q. To each girl? A. Yes.

(Testimony of Elsie Elizabeth Dickerson.)

Q. And does each girl pick an apple up in each hand and put one on each spindle?

A. Yes, this way one, and then one, keep them going like that.

Q. You are constantly picking up apples?

A. Yes. [1129]

Q. In both hands, and putting them on the spindles? A. Yes.

Q. On both, about the same time, is that right?

A. Yes.

Q. Now, that apple goes down the spindle, doesn't it? A. Yes.

Q. Now, is that a table in front of you?

A. Yes.

Q. Yes; and does the spindle extend up above the table? A. Yes.

Q. And this spindle is set into a circular opening, is it not, in the table? A. Yes.

Q. Then after you put the apple on the spindle, the apple goes down the spindle into this opening, is that right, and it goes under the table?

A. Yes.

Q. And below the table; is it correct that there is a series of knives—— A. Yes.

Q. And the apple goes down onto these knives, and is then cut into slices, is that right?

A. Yes.

Q. And then where does it go from there?

A. Well, there's a big trough underneath there, then apples drop into that.

Q. Go from the slicing blades——

(Testimony of Elsie Elizabeth Dickerson.)

A. Go from the slicer, they drop into this trough.

Q. And then where do they go?

A. Well, they go on down into water again, or water drops a little lower, then there's a paddle affair that takes them up.

Q. Sort of—this paddle affair that you are referring to, is that a—

A. It has—

Q. —a series of scoops?

A. It has little shelves that catch the apples and take them up.

Q. They are little scoops, aren't they, metal scoops? A. I guess you'd call them that.

Q. And they catch the apples and they take them where?

A. They take them up and then onto a shaker thing.

Q. All right. And where do they go from the shaker? A. They drop onto a table.

Q. Now, this table that you refer to, isn't that a large rubber belt? A. Yes.

Q. And it is constantly moving? A. Yes.

Q. And the apple slices, as they come out of the shaker, come [1131] out in a steady flow, don't they? A. Yes.

Q. And they come out in a pile about two inches or more thick, do they not?

A. About like that.

Q. Two inches or more thick. Now, the shaker

(Testimony of Elsie Elizabeth Dickerson.)

doesn't always get the seeds you referred to out of the slices, does it, to your knowledge?

A. To my knowledge, I don't know for sure if it takes them all out or not.

Q. You never worked there?

A. I worked down there for about a half an hour one day.

Q. I see. And during that half hour that you worked on that occasion did you notice whether the shaker took all of the seeds out?

A. No, I did not.

Q. You didn't notice? A. I didn't notice.

Q. All right. During that half hour that you worked there at that time, did you notice whether the women who worked on the belt at the shaker were able to get all of the slices that came down and had seeds in them that the shaker did not take out?

Mr. Magor: Just a minute. I am going to object to that on the ground it asks for an opinion and conclusion of the witness.

Trial Examiner: Read the question. [1132]

(Question read.)

Trial Examiner: I will permit her to answer if she can tell.

A. Well, I can't quite answer that, if it took out—if everything was picked out. Each girl picked up all they could.

Q. (By Mr. Berke): Well, do you know if any got by them that they were not able to get?

(Testimony of Elsie Elizabeth Dickerson.)

A. I wouldn't know for sure. I was working right in my own little square.

Q. All right. How many women worked at that belt near the shaker, do you know, or did last year?

A. About six.

Q. About six. Do they stand three on a side?

A. Yes.

Q. That is, they face each other?

A. Yes, and then one on another thing that takes the apples up, sometimes two; after they are on that table, then this elevator thing takes them up and there's another woman picking there.

Q. Now, this table you refer to, is that actually, so the record is clear, this moving rubber belt?

A. Yes.

Q. Do you know how wide that rubber belt is, approximately?

A. Oh, goodness, I don't know. It could be about two and a half feet.

Q. It is rather wide? [1133] A. Yes.

Q. And it is full of apples when the cannery is processing them? A. Yes.

Q. Now, what shift did you work in 1953, Mrs. Dickerson? A. Day shift.

Q. And in 1954, I understand that you made application for employment at Sagu, in the month of June? A. Yes.

Q. Do you know about when in June?

A. I believe it was the latter part of June.

Q. In any event, several weeks before you actually went to work there?

(Testimony of Elsie Elizabeth Dickerson.)

A. Well, it was about three or four weeks, I believe, yes.

Q. Yes. Now, in 1954 you first began to wear a Union button at work on the day before October 15th?

A. On the day—two days before October 15th?

Q. You began to wear it then? A. Yes.

Q. Oh, maybe I misunderstood you. And did you wear it where it could be seen?

A. Yes, I did.

Q. And did you—You attended the meeting that was held in the warehouse on October 15th?

A. Yes. [1134]

Q. And you continued to work when they went from two shifts to one shift? A. Yes.

Q. You came back the following Monday, October 18th, and continued working? A. Yes.

Q. Now, you say that you worked on the slicer as your regular job? Is that right? A. Yes.

Q. Who originally assigned you to the slicer, do you recall? A. Edna Hardin.

Q. That was in July of 1954, when you went to work there that season?

A. No, I didn't go right on the slicer when I went to work, it was probably about, maybe three weeks later that she put me up there.

Q. I see. What did you work on immediately, in July? A. I was a trimmer.

Q. Trimmer. And who assigned you to that position? A. Edna Hardin.

Q. Did you work as a trimmer for about three

(Testimony of Elsie Elizabeth Dickerson.)

weeks and then she assigned you to the slicing units? A. About that, I believe.

Q. And the first time after that that you went to the trimmer was one afternoon in October of 1954? [1135] A. Yes.

Q. And on that occasion you had gotten Mrs. Herrerias' permission?

A. The first day I went over, yes.

Q. Did you personally ask her permission or——

A. I personally did.

Q. Yes. And that was after lunch? A. Yes.

Q. Is that right? And did you work that full afternoon? A. No.

Q. Until what time?

A. Till about around 3:00 o'clock.

Q. And then what did you do?

A. I went back on the slicer.

Q. And the next time that you worked as a trimmer was on October 25th, the day of your discharge? A. Yes.

Q. And was that in the afternoon also?

A. Yes.

Q. Now, on that occasion, as I understand it, you did not get permission to work on the trimmer?

A. That's correct.

Q. How did you arrange that?

A. Well, the little girl that had asked me to change places with her the first time came back to me the second time and [1136] asked me if I would change. She said she was tired.

Q. What was her name? A. Ruth Deal.

(Testimony of Elsie Elizabeth Dickerson.)

Q. And so you changed places with her without getting permission? A. Without permission.

Q. Of your supervisor? A. Yes. [1137]

* * * * *

Mr. Berke: Yes.

Q. (By Mr. Berke): Mrs. Dickerson, following your discharge on October 25th, you made application for unemployment compensation, did you not?

A. Yes.

Q. And did you give a reason for your discharge to the State Employment? A. Yes, I did.

Q. What reason did you give?

A. That I was fired.

Q. For what? A. For decorating an apple.

Mr. Berke: Will you mark this as Respondent's next in order.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 7 for identification.)

Q. (By Mr. Berke): Mrs. Dickerson, I show you a photostatic copy of a document marked Respondent's Exhibit 7 for identification, which purports to be a claim for unemployment compensation. Is that your signature on the bottom?

A. Yes.

Q. And where it says up here, "7. Give actual reason you left your last employer," appears the word "Fired," and then — printed, and then in script, "For decorating an apple." [1142]

A. Yes.

(Testimony of Elsie Elizabeth Dickerson.)

Q. Is that in your handwriting, that "For decorating an apple"? A. Yes, it is. [1143]

* * * * *

Trial Examiner: I will receive Respondent's Exhibit 7 in evidence. [1146]

* * * * *

MARIE RUTH TRIPP

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): Mrs. Tripp, have you ever worked for [1158] Sebastopol Apple Growers Union? A. Yes, I have.

Q. On one occasion or more than one occasion?

A. I beg your pardon?

Q. On one occasion or more than one occasion?

A. Just last year was the first time.

Q. Do you remember when it was that you began last year? A. September 10th.

Q. Now, what was your job?

A. Well, I started as a trimmer, then I worked various jobs, outside too.

Q. What shift? A. Day shift.

Q. Did you sign an authorization card or pledge card in the Union? A. Yes, I did.

Q. Local 980. Was it before or after you came to work for the Company? A. After.

Q. And do you remember when it was that you did that, that you signed this card?

(Testimony of Marie Ruth Tripp.)

A. About a week after I went to work. [1159]

* * * * *

Q. Now, did you get a Union button at any time while you worked at the plant? A. Yes, I did.

Q. Do you remember when you received it?

A. Well, the day before the lay-off.

Q. Do you remember when the lay-off was?

A. October 15th.

Q. I hand you General Counsel's Exhibit 31, and ask you if the Union button you received at that time is the same as this button that——

A. It is, yes.

Q. Now, you will notice, Mrs. Tripp, on this button there is a place right after the word "Local" on the button where the enamel has been scratched off so that the metal, bare metal comes through, and no Local number appears; do you notice that? [1164]

A. Yes.

Q. Was your button the same or different in that respect, if you remember?

A. I don't remember. I think it was like that.

Q. Yes. All right. Now, what did you do with the button after you got it?

A. I wore it on the collar of my shirt, blouse.

Q. Was it obstructed by anything? A. No.

Q. You wore it, then, on what dates, do you remember?

A. Well, the 14th and 15th of October.

Q. Did you wear it at the plant while you were at work? A. Yes, I did.

Q. Do you remember where you were working on October 14th, what job?

(Testimony of Marie Ruth Tripp.)

A. In the can car.

Q. Who was working there with you, what employees? A. Ruth Clark and Shirley Veach.

Q. Did they have Union buttons, did they wear them that day? A. Yes, they did.

Q. Where did they wear them?

A. On the seat of their jeans, on the back.

* * * * *

Q. I see, I see. Now, were you laid off on October 15th, 1954? A. Yes, I was.

Q. Did you go to the meeting at which the lay-off was announced? A. Yes, I did.

Q. Who told you to go to it?

A. There was a blackboard that said that at 4:30 all the employees were to go into the warehouse.

Q. When you got there, who all was there?

A. Well, the day and night shift and Mr. Martini, Mr. Bondi, Mr. Wilson, the bookkeeper, Mr. McGuire, I believe, everyone involved, concerned.

Q. Will you tell us, as well as you can recall now, what was said, and to the extent that you can, who said it.

A. Well, I know that a letter was read. I am not sure whether Mr. Martini read it or Mr. Bondi; that we were—there was a shortage of apples, there were only 250 tons left to process, and so forth, and they would have to lay off; they would just keep on enough employees for the next two weeks, till they could finish up; and then I do remember Mr. Bondi saying that we would all be invited to a dinner at

(Testimony of Marie Ruth Tripp.)

the close of the season, and they hoped to see us all back next year. And those whose names were read from the list would remain, the others would—were discharged. [1167]

Q. Do you remember anything else that was said at that meeting?

A. Oh, about that we could turn in our receipts for our caps and aprons and get our money back.

Q. Anything else that you can recall?

A. No.

Q. Did anyone say anything about how this list was made up?

A. Yes, the names were—they said the names were picked according to seniority, those with the greatest seniority were to remain on, and the newer employees were to be let go.

Q. Who read the list, do you recall?

A. No. It wasn't Mr. Martini or Mr. Bondi, but I don't recall. [1168]

* * * * *

Q. After the election was over, did you have a conversation with Mr. Martini?

A. Yes, I did.

Q. Where?

A. At a place called Molino Corners.

Q. What sort of a place?

A. It's a filling station, and they serve food and beer and wine.

Q. What time—or, with reference to the election, when was this? [1173]

(Testimony of Marie Ruth Tripp.)

A. Oh, I'd say probably around seven o'clock in the evening.

Q. The same—— A. The same evening.

Q. The same day? A. The same day.

Q. The evening of the day of the election, is that right? A. That's right.

Q. Anyone else present at the time this conversation occurred, and by "present," I mean anyone who would be in a position to hear what was said by either of you? A. No.

Q. Will you tell the Examiner, to the best of your present recollection, what Mr. Martini said to you on that occasion?

A. He said, "How did you vote?" And I laughed.

Q. Why did you laugh?

A. Well, I certainly wouldn't want to tell anybody, give an answer, and I figured that was the easiest way out.

Q. Did he say anything else to you that you can recall?

A. He said—Am I allowed to say what I said to him first?

Q. I want what both of you said, yes.

A. I said I was surprised that I got laid off, and he said, "Oh, did you get laid off?" and I said, "Yes," and he said, "Well, give me your name and phone number and we will give you a call in a few days to come back to work."

Q. Did you receive such a call? [1174]

A. No, I didn't.

(Testimony of Marie Ruth Tripp.)

Q. Have you, till the present day, received such a call? A. No, I haven't.

Mr. Karasick: You may examine.

Cross Examination * * * * *

Q. (By Mr. Berke): On the occasion in Molino Corners when you say you met Mr. Martini and had this conversation where you claim he asked you how you voted, wasn't his question to you, how was the election going, did it suit you?

A. He said that, too, and he said how did you vote, but I remember "How did you vote?" because it seemed rather personal.

Q. I see. But you didn't remember, however, if he asked you whether the election suited you?

A. I remember him saying something about how did it suit you, and he said but how did you vote.

Q. Mr. Karasick asked you for the conversation and you mentioned nothing about that, did you?

A. I just — When you said "suit," I remembered it.

Q. I see. A. The words "suit you." [1179]
* * * * *

ERNESTINE ALBINI

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): Miss Albin, have you ever worked for Sebastopol Apple Growers Union?

(Testimony of Ernestine Albini.)

A. Yes.

Q. On one occasion or more than one occasion?

A. Two, twice.

Q. Two times? A. Yes.

Q. When was the first, Miss Albini?

A. 1953.

Q. And what was your job then? [1181]

A. I was a trimmer.

Q. On what shift? A. On the day shift.

Q. Did you work throughout the entire season that year? A. No.

Q. When—How long did you work?

A. Just until September.

Q. And then what happened?

A. I went back to school.

Q. You quit your job? A. Yes; yes, sir.

Q. And went back to school? A. Yes.

Q. In 1954, were you employed at Sebastopol Apple Growers Union? A. Yes, sir. [1182]

* * * * *

Q. Now, do you remember any office or clerical work you did in connection with any payroll list?

A. Yes.

Q. What was the work that you did in connection with that?

A. Well, I typed up a couple of names.

Mr. Berke: Just a moment. I am going to object to that. That gets into confidential matter. The Board has held a person doing secretarial work in connection with payroll, that is confidential matter.

(Testimony of Ernestine Albini.)

I am really surprised that Mr. Karasick would go into that. [1184]

* * * * *

Trial Examiner: I will permit the question.

* * * * *

Q. (By Mr. Karasick): Did you type such a list while you were there? A. Yes.

Q. And that was when, did you say?

A. Before——

Q. Before the—— A. Before the lay-off.

Q. Before the October 15th lay-off?

A. Yes.

Q. How long before?

A. A couple of days. [1185]

Q. Do you know Bill McGuire? A. Yes.

Q. What was his job there at that time?

A. He was on the traffic and sales departments.

Q. And did you hear him make some remark with regard to this list? A. Yes, I did.

Q. And will you tell us to the best of your recollection—Where were you at the time?

A. I was sitting at the switchboard.

Q. Anyone else immediately present, and by “immediately present” I mean anyone who would have been in a position to hear what he said?

A. I don't know. I just never paid much attention.

Q. Did he address this remark to someone else?

A. Yes.

Q. Who? A. Mr. Marsland.

Trial Examiner: Spell the last name.

(Testimony of Ernestine Albini.)

The Witness: M-a-r-s-l-a-n-d.

Q. (By Mr. Karasick): Lloyd Marsland?

A. Yes.

Q. He was a payroll clerk there? A. Yes.

Q. What did Mr. McGuire say to Mr. Marsland in connection with [1186] this list?

A. Well, he wanted, was going to check—

Q. Just tell us as well as you recall what he said.

A. He was going to check off some names with him from the payroll.

Q. And what did Mr. McGuire say to Mr. Marsland about the list?

A. He wished he knew who was for the Union.

Mr. Berke: Marsland said that?

The Witness: No, Bill did.

Mr. Berke: Oh.

Q. (By Mr. Karasick): And do you recall anything else he said in that connection? A. No.

Q. Do you remember whether at that time he mentioned another list? A. Yes.

Q. What did he say?

A. Said something, I don't remember.

Q. Just—Are you nervous? A. Yes.

Q. All right. Just be calm. There's no need to be nervous, Miss Albini. Just sit there and take your time, recollect your thoughts as well as you can, and tell the Examiner here what it was that you heard Mr. McGuire say, as you can best recall it [1187] now. A. I don't remember.

Trial Examiner: You don't remember?

The Witness: No.

(Testimony of Ernestine Albini.)

Q. (By Mr. Karasiek): What you've told us up until now is the best you remember, is that right?

A. Yes.

Q. Now, again, let's see if I can refresh your recollection. Do you remember, you said you remembered something being said about another list?

A. Yes.

Q. Now, what did Bill McGuire say about the other list? A. I don't—I don't remember.

Q. Do you remember testifying, Miss Albini, that you heard Bill McGuire say to Marsland that McGuire would like to know who was for the Union? A. Yes.

Q. All right. Now, do you remember what else he said?

A. Said so we could make up another list. [1188]

* * * * *

Q. I see. All right. Now, when did you last work at the Sebastopol Apple Growers Union, Miss Albini? [1192] A. May the 6th.

Q. And did you quit or were you discharged?

A. I was discharged.

Q. I see. And any reason assigned for your discharge? A. They said I was too young.

Q. Too young; how old are you?

A. Nineteen. [1193]

* * * * *

Cross Examination

Q. (By Mr. Berke): Miss Albini, you were working, when you last worked there for the Com-

(Testimony of Ernestine Albini.)

pany in the months of May and April, on the switchboard, were you not? A. Yes.

Q. A lot of calls come in on that switchboard?

A. Yes.

Q. And did you work under Mr. Wilson?

A. Yes.

Q. He was in charge of the payroll out there, was he not? A. Yes.

Q. Pardon? A. Yes.

Q. Now, was it Mr. Wilson that discharged you?

A. Yes, yes.

Q. Do you remember that he told you not only that you were too young, but also that there was a problem about your handling the switchboard, it was kind of difficult? A. No. [1194]

* * * * *

Trial Examiner: How long did it take you to prepare this or type this list that you were speaking of?

The Witness: Oh, not very long.

Trial Examiner: How long was it?

The Witness: About a half hour or so.

Trial Examiner: How many pages?

The Witness: There was one page, but there was four or five copies.

Trial Examiner: Just one page of names? [1198]

The Witness: Yes.

Trial Examiner: How many columns?

The Witness: Two.

Trial Examiner: Single or double spaced?

The Witness: Single.

(Testimony of Ernestine Albini.)

Trial Examiner: Were the columns separated as to men and women or were they all jumbled, mixed together?

The Witness: They were all together.

Trial Examiner: Were they in alphabetical order or otherwise?

The Witness: Yes, alphabetical order.

Trial Examiner: I believe you testified that they were on both the day and night shifts, is that right?

The Witness: Yes.

Trial Examiner: Was the list typed—On what color paper was it?

The Witness: White.

Trial Examiner: Letterhead or plain?

The Witness: Plain. [1199]

* * * * *

GLORIA LINDSAY

called as a witness by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Magor): Miss Lindsay, were you ever employed by Sebastopol Apple Growers Union? [1200] A. Yes.

Q. Do you recall when you were first employed by that Company? A. At the end of July.

Q. What year is that? A. '54.

Q. What shift were you working on at that time? A. Day shift.

(Testimony of Gloria Lindsay.)

Q. Who was your floor lady at the time when you first went to work? A. Edna.

Q. Edna Hardin? A. Yes.

Q. Now, where were you working at the time?

A. On the squirrel cage.

Q. And who else, if anybody, was working with you?

A. Gloria Pate and Mary Castino.

Q. They were working at the squirrel cage, too?

A. Yes.

Q. During the time that you worked for the Company in 1954, did you sign any Union authorization card? A. Yes, I did.

Q. Do you recall when it was?

A. Some time in August.

Q. Was it the first part of August?

A. First part, yes. [1201]

* * * * *

Q. And after signing the Union authorization card, Miss Lindsay, did you ever have any conversation with Mr. Martini with respect to the Union?

A. Yes, I did. He mentioned it quite frequently.

Q. Where were you at the time?

A. At the—working, by the squirrel cage.

Q. And do you recall when it was that you first talked to him?

A. It was right after—started talking about the Union after we got the pledge cards. He asked, come up and asked us if we was for it, and we said yes, and he told us we shouldn't be for it because it wasn't going to help us none and in the long run

(Testimony of Gloria Lindsay.)

we'd be better if we stuck with him, and the following year he'd give us a five cent raise, and then the next year we'd get another five cent raise, as long as we kept sticking with him, kept getting a nickel raise, and he said if you join the Union it's five dollars and the fee is three-fifty—he said that's all a lie, they'd up—once they got the plant Union they'd make us pay twenty to join and up the fee a month.

Q. You say "we"; who are you referring to?

A. Gloria Pate and I.

Q. Was he talking to you and Gloria Pate?

A. Yes.

Q. Did Mary Castino engage in the conversation at all? A. Not that I can remember.

Q. Where was she working in relation to you?

A. She was over a little bit from us.

Q. I see. Now, when you were talking to Mr. Martini, do you recall when that was, the specific date?

A. No, I can't say the date, but it was right in August, when he started; he even brought the newspaper clipping saying this about the——

Q. Well, just a moment. Is this the same time?

A. No.

Q. Now, directing your attention to the conversation that you just related, can you tell us to the best of your recollection today what time of day that was?

A. No, I couldn't say for sure.

Q. Was it in the morning or the afternoon?

A. It was probably in the afternoon.

(Testimony of Gloria Lindsay.)

Q. Was this during working hours?

A. Yes.

Q. How long was Mr. Martini talking to you at the time?

A. Oh, he was—talked to us a good ten minutes, over. [1203]

Q. Did you talk to Mr. Martini after that at all?

A. You mean after hours?

Q. Or after that conversation?

A. Oh, yes.

Q. How often did you talk to him?

A. Quite frequently. I mean, mostly, when he'd come in, he'd come over and talk to us, unless he was in a hurry, he'd go to the office and then dash right off, out.

Q. When you say quite frequently, did he talk to you every day?

A. No, I mean every time he come in, except when he come in, in a hurry, and he wasn't there every day.

Q. I see. How many times a week did he talk to you and Gloria Pate?

A. Oh, I couldn't say that, but it's many times as he came in.

Q. Well, can you say approximately how many times?

A. Well now, like sometimes when he come in the morning, he'd talk to us, then that afternoon he'd come in and talk to us again.

Q. He talked to you more than once a day at times, is that right? A. Oh, yes.

(Testimony of Gloria Lindsay.)

Q. Is there any other conversation that you recall that you had with Mr. Martini with respect to the Union?

A. Yes, he told us that if the plant did go Union he'd close [1204] it down.

Mr. Berke: Wait a minute. I move that be stricken, and let's fix the time, lay a proper foundation.

Trial Examiner: Lay a foundation. I will grant the motion.

Mr. Magor: All right, I agree it may go out past the "Yes."

Q. (By Mr. Magor): You had other conversations with him? A. Yes.

Q. Do you recall when the next time was that you talked to Mr. Martini, the conversation you were about to relate?

A. No. It was between August and October.

Q. I see. Do you know Mrs. Storey?

A. Yes, I do.

Q. Do you know that she was discharged?

A. Yes.

Q. Was this before or after Mrs. Storey was discharged, if you know?

A. Oh, I think it was before. I'm not sure.

Q. Do you remember what time of day you were talking to Mr. Martini on this occasion? Was it in the morning or the afternoon?

A. No, I don't.

Q. Will you tell who was present at this time?

A. Yes, Gloria Pate. [1205]

(Testimony of Gloria Lindsay.)

Q. Did she engage in the conversation?

A. Yes, she did.

Q. Was anybody with you—with Mr. Martini?

A. Yes, there was somebody else, but he was standing sort of back from us.

Q. I see. Now, will you relate for us today to the best of your recollection what was said and who said it?

A. Well, Mr. Martini said it and he come right out and he said that he—if the plant would go Union that he'd close it down, that he'd lose too much money if it went Union, that he'd closed down his plant here in Santa Rosa on account of the Union.

Q. Was anything else said at the time?

A. Not that I remember. [1206]

* * * * *

Q. Had you talked to him after that at all?

A. Yes, I did.

Q. About the Union? A. Yes.

Q. Do you recall when the next occasion was?

A. Not right off, no. He gave me a clipping, a newspaper clipping.

Q. Do you recall when it was he gave you a newspaper clipping?

A. It was after Mrs. Storey was laid off.

Q. Do you recall how long after it was, to the best of your recollection today?

A. No, I can't.

Q. Where were you at the time?

A. Working on the squirrel cage.

(Testimony of Gloria Lindsay.)

Q. Who else was present?

A. Gloria Pate.

Q. And did she engage in any conversation that took place? A. Yes, she did. [1207]

Q. Was anybody with you—with Mr. Martini at that time? A. No, not that I can remember.

Q. Was this in the morning or in the afternoon?

A. In the morning.

Q. Will you now relate for us today to the best of your recollection what was said at that time and who said it.

A. Mr. Martini said it and he come up and he handed me this clipping out of the newspaper and he said, "Now, what do you think of the Union?" and "Read this," he says, "and show it to the officials of the Union, the Union officials." And he says, "See what they have to say about it." And he said, "And come back and tell me." And I said, "Well, I will have to show it to the kids around here first," and he said "Go ahead," so later on I showed it to them, then they showed it to the Union officials and they said it had nothing to do with the Union here, and it was all about the union back in New York that went bankrupt and they didn't know if that was for the year that he handed it to me, in '54, or could have been back later on. [1208]

* * * * *

Q. During the time that—Strike that. When was the last day that you worked for the Company?

A. The 14th of October.

Q. Did you go to work on October the 15th?

(Testimony of Gloria Lindsay.)

A. No, I didn't, I was sick.

Q. You were sick. Did you ask anybody to report that you were sick to the Company?

A. Yes, Gloria Pate did it for me.

Q. Did you go back to work after October 15th?

A. No, I didn't. [1210]

* * * * *

Q. (By Mr. Magor): Did you ever work in the can car? A. Yes.

Q. Or relieve anybody?

A. I relieved out in the can car.

Q. And did you ever have any conversation with Mr. Martini in the can car?

A. Yes, on one occasion he came up and asked me what I was doing there and I told him I was relieving the girls, and he said, "Well, what are you trying to do, change them over to the Union," he says, and I says, "No," I says, "I'm not trying to do that," and he says, "Well," he says, "I bet you are campaigning for them," and said a few more wise-cracks, then said, "I ought to put you over with Mr. Storey, you two could have a ball."

Trial Examiner: Could what?

The Witness: Put me over with Mr. Storey, so we two could have a ball.

Q. (By Mr. Magor): What did you say?

A. I asked him why he didn't.

Q. Do you recall when this was?

A. It was after Mrs. Storey was laid off.

Q. Will you tell us to the best of your recollection today how long it was after Mrs. Storey was

(Testimony of Gloria Lindsay.)

discharged? A. About a week.

Q. Do you recall what time of day it was?

A. I think it was in the morning. [1212]

* * * * *

Q. After October 15th, were you out at the plant at any time in the company of Gloria Pate?

A. Yes, October 18th, I took her out to work, and I came back, and she phoned me up and told me to come and get her, she was laid off, so I came and picked her up. In the meantime, I [1213] went in and got her and we ran into Mr. Martini, so she stopped, and she was talking to him, and while she was talking to him——

Mr. Berke: Wait a minute. Way beyond the question asked. May we have a foundation?

Mr. Magor: I will lay the foundation.

Q. (By Mr. Magor): You say you went out to pick her up? A. Yes.

Q. About what time of day was that?

A. It was in the morning.

Q. And did you see Mr. Martini at the time?

A. Yes, I did.

Q. Was Gloria Pate present?

A. Yes, she was.

Q. Where was Mr. Martini?

A. Standing outside.

Q. Was anybody else present? A. No.

Q. Did you engage in any conversation?

A. Yes, he was talking to somebody that just happened to come walking up, and she started talking to them.

(Testimony of Gloria Lindsay.)

Q. How far away from them were you?

A. Oh, about three or four feet.

Q. Did you hear the full conversation between Gloria Pate and Mr. Martini?

A. No, I didn't, I heard some of it. [1214]

Q. Will you relate for us what you heard, tell us what was said and who said it.

Mr. Berke: I am going to object to it. She didn't hear the whole conversation. It is out of context.

Trial Examiner: I will take it.

A. Well, I heard her asking him why she was laid off, that they didn't call her name on the 15th, and she comes back and they told her she wasn't supposed to be here, and she asked him why they didn't call her name on the 15th, and asked him if he didn't know why she wasn't called back on the 15th, and he said, "I don't know," just looked at her dumbfounded and shook his head, I don't know.

Q. What else did you hear, if anything?

A. Well, that's it.

Mr. Magor: You may examine. [1215]

Cross Examination * * * * *

Q. (By Mr. Berke): All right. Now, you have related some conversations you had with Mr. Martini on several occasions, which you say took place either before or after Mrs. Storey's discharge. When was Mrs. Storey's discharge?

A. The exact date?

(Testimony of Gloria Lindsay.)

Q. Well, you fixed these conversations either before or after. Now, tell me when.

A. Well, it was in September.

Q. When in September?

A. Well, I think the 18th. I'm not sure.

Q. That is your best recollection?

A. Yes.

Q. Now, you say that the first conversation you had with Mr. Martini about the Union took place when? A. After we got the pledge cards.

Q. When was that, that you got the pledge cards? A. In the first part of August.

Q. Well, can you be more specific than about the first part of August? [1217]

A. Oh, around the 5th, 6th.

Q. When did you sign your Union authorization card? A. Right after I got it.

Q. When was that? A. The exact date?

Q. Yes. A. I can't remember.

Q. And you say Gloria Pate was present and participated in the conversation? A. Yes.

Q. Do you remember what she said?

A. No, I tried to cover everything.

Q. Do you remember what she said?

A. No, I don't.

Q. The next time you said you had a conversation with Mr. Martini about the Union was some time between August and October, before Mrs. Storey's discharge, is that right?

A. Well, I talked to him quite a bit about the Union.

(Testimony of Gloria Lindsay.)

Q. Well, just answer my question, Miss Lindsay. Do you want it read to you again? A. Yes.

Mr. Berke: Will you read it, Mr. Reporter.

(Question read.)

The Witness: Well, no, she was discharged before October.

Q. (By Mr. Berke): My question was, you say that the next time [1218] you talked with Mr. Martini about the Union was some time between August and October, before Mrs. Storey's discharge?

Mr. Magor: Now just a moment.

Q. (By Mr. Berke): Is that right?

A. No, he asked me, I think, if it was before Mrs. Storey was fired or after.

Q. Who asked you? A. I think he did.

Q. Referring to Mr. Magor? A. Yes.

Q. All right. And your answer was what?

A. Before.

Q. Before. And can you tell us when before her discharge this conversation took place?

A. No, I can't.

Q. And did Gloria Pate participate in that one also? A. Yes, she did.

Q. Do you know what she said?

A. No, I don't remember. [1219]

* * * * *

Q. Now, in that second conversation that you related with Mr. Martini, you said something about if the Union came in he would lose too much money and he would close his plant down in Santa Rosa?

A. That he had.

(Testimony of Gloria Lindsay.)

Mr. Magor: Just a moment, just a moment.

Trial Examiner: Overruled.

Mr. Magor: I am going to object on the ground it misstates the evidence. That is not what the witness testified to.

Trial Examiner: The witness knows what she testified to. I will let her answer.

The Witness: Would you mind repeating that?

Mr. Berke: Yes, read the question, Mr. Reporter, please.

(Question read.)

The Witness: No, I didn't mean that. He'd close down the plant, the apple plant, like he did close down his plant in [1220] Santa Rosa.

Q. (By Mr. Berke): Oh, he said he'd close down his apple plant like he closed down his plant in Santa Rosa? A. Yes.

Q. Is that what you recollect him saying now?

A. Yes.

Q. Those were his exact words?

A. Maybe not exactly his exact words.

Q. Now, you said he talked to you and Gloria Pate on that occasion for a good ten or fifteen minutes, is that right? A. Right.

Q. Was that all that was said in that good ten or fifteen minutes?

A. Well, I can't remember exactly what all was said.

Q. I see. All you can remember is what you told us here? A. Yes.

(Testimony of Gloria Lindsay.)

Q. Mr. Martini's part but not Glora Pate's part? A. No.

Q. Now, you didn't go to work on October the 15th, you said, is that right?

A. That's right.

Q. And what was the reason for your not going? A. I was sick.

Q. And you didn't go back after October 15th?

A. Not back to find out if I was still working or not. I [1221] come back the 18th—

Q. Pardon?

A. I went back the 18th, just to take a girl there.

Q. Just to get Gloria Pate? A. Yes.

Q. But you didn't inquire, while you were there, about whether you had a job or not?

A. No, I didn't.

Trial Examiner: Will you read that answer? I went back to do something. It sounded like "to take a girl."

(Answer read.)

Q. (By Mr. Berke): Did you mean to take a girl there or to get a girl?

A. No, I first—I took her in there.

Q. I see. And then you later went back that day, on the 18th? A. Yes.

Q. So you were there twice on the 18th?

A. Yes.

Q. And on neither occasion did you make inquiry about whether you had a job? A. No.

* * * * * [1222]

MARY CASTINO

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Magor): Are you appearing here voluntarily, Mary, or have you been subpoenaed?

A. I have been subpoenaed.

Q. Were you ever employed by the Sebastopol Apple Growers Union? [1234]

A. Yes.

Q. Do you recall when you were first employed by that Company?

A. About the 21st of July, for 1954.

Q. And what shift were you working on?

A. Day shift.

Q. When was the last day on which you worked for the Company in the 1954 season?

A. December 11th.

Q. And why did you terminate your employment at that time?

A. End of the season.

Q. During the time that you were first employed, until December the 11th, 1954, did you continuously work on the day shift?

A. Yes.

Q. What was your job?

A. I was inspector trimmer.

Q. And who was your floor lady when you were first employed?

A. Edna Hardin.

Q. Did you ever have any floor lady other than Edna Hardin after that?

A. Elicia Unciano and Ella Herrerias.

Q. Was there a lay-off at the Company on Octo-

(Testimony of Mary Castino.)

ber 15th, 1954? A. Yes, there was.

Q. Will you tell us when Ella Herrerias became the floor lady on the day shift? [1235]

A. Right after the lay-off.

Q. Where, physically, in the plant did you work?

A. I worked down after the apples, past the squirrel cage, on that small trimming table.

Q. I show you General Counsel's Exhibit No. 23 in evidence and I ask you if you can point out where you worked.

A. I can't see too good without my glasses.

Q. Do you have your glasses with you?

A. No, I haven't. This would be the squirrel cage here. This is the section I worked, right at the end of that, right in here, inspection belt.

Q. Inspection belt?

A. That's right, that's it

Q. I see. Now, did you have the same job and work in the same place all the time you were working for the Company?

A. Yes, the whole time I worked there, I started and I finished there.

Q. Will you tell us, briefly, what your duties were?

A. Well, my duties were, after the apples came through the squirrel cage I was to pick off whatever remained on them, cores or spots or bruises or worms, or anything like that, to that order.

Q. Did anybody else work with you at that?

A. There was times there was three women, sometimes four.

(Testimony of Mary Castino.)

Q. Do you know, can you tell us the names of who worked there? [1236]

A. I know one was Mahoney. I didn't know her first name, Mrs. Mahoney. And Clara Davello, and the other one is Virginia Chicano.

Q. Now, after the lay-off on October 15th, 1954, were those same three ladies——

A. No, before—this is after the lay-off?

Q. This is after the lay-off.

A. Yes, but before the lay-off, Gloria Lindsay and Gloria Pate.

Q. Worked at the squirrel cage?

A. Worked at the squirrel cage.

Q. Or past the squirrel cage?

A. Past the squirrel cage.

Q. Did you notice Elsie Dickerson while you were working there?

A. I met her at the plant, yes.

Q. You knew her at the Company? A. Yes.

Q. Did you know that she was discharged?

A. Yes.

Q. How do you know that?

A. Well, there was a commotion around at five o'clock that she was laid off.

Q. Do you recall the day of the month, or the month?

A. As near as I can remember, I think it was around October 25th. [1237]

* * * * *

Q. (By Mr. Magor): Do you know where Elsie was working on this last day?

(Testimony of Mary Castino.)

A. She worked on the slicing table in the morning, and in the afternoon she went on the trimming table, the big trimming table.

Q. Did you see her on the trimming table?

A. Well, I couldn't see her from where I was working.

Q. How do you know she was on the trimming table? [1239]

A. Because she passed by my table when she went by.

Q. I see. And you observed her earlier at the——

A. At the slicer.

Q. ——at the slicing table?

A. During recess I saw her up there.

Q. Now, on this last day that Elsie Dickerson was working for the Company, what were your duties on that day?

A. Inspecting, trimming.

Q. Were you working at the same place?

A. Same table.

Q. ——you earlier said?

A. Yes, that's right.

Q. Do you recall who else was working with you on that day?

A. Virginia Chicano and Clara Davello and Mrs. Mahoney.

Q. Did you work side by side or what?

A. Yes, we worked side by side.

Q. And that's four people standing right side by side?

A. That's four people, yes.

Q. Will you tell us whether or not you ob-

(Testimony of Mary Castino.)

served anything unusual about the apples on that day?

A. Well, I remember one coming through with holes in it, and a core sticking out of it.

Q. Do you recall what time of day that was?

A. I think it was sometime in the afternoon.

Q. Just tell us what you observed and where you saw it. [1240]

A. Well, it came down the belt.

Q. And what belt is that?

A. Oh, that small belt that I was working on, and someone picked it up—

Q. Where was it coming from?

A. It was coming from the squirrel cage.

Q. Was it—Strike that.

You say somebody picked it up? A. Yes.

Q. Do you know who picked it up?

A. I'm pretty sure it was Ella Herrerias, the floor lady.

Q. And what did you observe then?

A. Well, she just went around to the back of it, to the big trimming table—I don't know what went on back there.

Q. Just tell us what you observed.

A. Well, that's what I saw, she picked it up and she went around to the back.

Q. I see. Will you describe how that apple looked?

A. Well, from what I could see, it had holes in it, more than two holes in it, and it had a core sticking out from one side.

Q. How far was the core sticking out?

(Testimony of Mary Castino.)

A. Oh, about an inch.

Q. About an inch. Now, were you working there the day before this date? A. Yes. [1241]

Q. Same position? A. Same position.

Q. Were you working there two days before this day? A. Yes.

Q. The same position?

A. The same position.

Q. Did you observe anything unusual about the apples the day before this incident? A. No.

Q. How about two days before this incident, did you notice anything unusual about the apples at that time?

A. No, not that I can remember.

Q. How about three days before the incident?

A. No.

Q. Were you working for the Company on the date of October 19th, 1954, when the National Labor Relations Board held an election at the plant?

A. Yes.

Q. From that date up until the time that Elsie Dickerson was discharged, were you working in the same position? A. Same position.

Q. Did you notice anything unusual about the apples at any time from the date of the election up to the date that Elsie Dickerson was discharged?

A. No, not that I recall. [1242]

Q. Had you ever noticed, during the time that you were working for the Company, anything unusual about the apples or anything unusual in the water or on the belt?

(Testimony of Mary Castino.)

A. Well, once a rubber mouse came through.

Q. Now, do you recall when that was?

A. That was when Edna Hardin was floor lady.

Q. And when, about, was this you saw or observed the rubber mouse?

A. Well, it was sometime in August.

Q. Do you recall what time of day it was?

A. Well, it was during working hours. I just don't recall whether it was before noon or after noon. I know it was during the day.

Q. Tell us what you observed.

A. This mouse came down on the belt, and I picked it up and put it up on this little motor. I didn't know who it belonged to, so I just left it there.

Q. And what was said, if anything, by any representative of management? A. Nothing.

Q. Now, after Elsie was discharged, did you see any rubber mouse after that?

A. Yes, there was one came through one morning, and I picked it up, and it was just about recess time, and Virginia Chicano took it and went to the dressing room with it. [1243]

Q. What happened, what occurred, what did you observe?

A. Well, I noticed the women, some of them got frightened, some thought it was funny, and that's all.

Q. Where was this other mouse that you described?

(Testimony of Mary Castino.)

A. In the same place on the belt, between the apples.

Q. And this is the belt that comes down to you?

A. That is the belt that comes down to me.

Q. Where were these apples coming from?

A. Well, they come from the squirrel cage.

Q. They come from the squirrel cage. Were you working there—were you working for the Company during the Hallowe'en period? A. Yes, I was.

Q. Tell us what you observed during that period?

A. There was quite a few apples coming through carved as pumpkin faces.

Q. And will you describe how they were carved?

A. Well, they had eyes and nose and mouth carved in it, carved in it, and one even had a rubber finger sticking out of it.

Q. And where did you see the rubber finger sticking out of it?

A. Sticking out of the top.

Q. And where did you observe these apples?

A. On that belt.

Q. And where were they coming from?

A. Through the squirrel cage.

Q. And will you describe how the faces were carved on the apple? [1244]

A. Just like regular pumpkin faces, eyes and nose and mouth.

Q. Was Ella Herrerias present at that time?

A. No, she wasn't. Edna was, she was working alongside of me, and she picked it up and brought it back up to Virginia.

(Testimony of Mary Castino.)

Trial Examiner: Edna Hardin?

The Witness: Edna Hardin.

Q. (By Mr. Magor): What occurred then?

A. Nothing; nothing was said.

Q. How many did you observe come through carved up like pumpkin faces?

A. Well, I wouldn't know offhand, but—

Q. Approximately?

A. There was quite a few.

Q. You say quite a few? A. Quite a few.

Q. Was it more than two?

A. It was more than that. I think it was—four or five that I can think of offhand.

Q. Did you observe any with the core sticking out of them?

A. No. Well, it wasn't unusual to see an apple with a core, sometimes the machine wouldn't take all the core out, and it would be left in there, and maybe the women on the big table would overlook it, and then they'd come through the squirrel cage. That was my job, clean the apple, take everything off that was on there that shouldn't have been on there. [1245]

Q. And if you observed a core in the apple, what would you do? A. Take it out.

Q. Now, when was it you observed this rubber glove?

A. Oh, this was—I think it was sometime in November.

Q. And what did you observe about that?

A. Well, it was just an ordinary apple with

(Testimony of Mary Castino.)

a face carved in it and the glove, finger of a glove sticking out of the core.

Q. Of the core hole or what?

A. The core hole.

Q. And where did you observe this?

A. On the table that I was working on.

Q. Where was it coming from, if you know?

A. The squirrel cage.

Q. What was done, if you know?

A. Edna Hardin picked it up and brought it back up to Virginia, and I don't know what she did with it, because I didn't—I kept on doing my work.

Q. I see.

Trial Examiner: Say, I'd like to get clear on something, Mr. Magor, at what point Ella Herrerias took over.

Mr. Berke: I was going to develop that.

Trial Examiner: Pardon me. Well, I am just wondering whether this is '54 or '53.

The Witness: '54. [1246]

Mr. Berke: When?

The Witness: '54.

Mr. Berke: This is the time when the evidence will show—the evidence will show that this was at a time when Mrs. Hardin was no longer a supervisor.

Trial Examiner: Oh, I see. She was still there but not a supervisor?

The Witness: No, no, she wasn't a supervisor any more.

(Testimony of Mary Castino.)

Q. (By Mr. Magor): Did Ella Herrerias ever say anything about any of these incidents that you have described? A. No.

Q. Did she ever warn you or—— A. No.

Q. ——instruct you—— A. No.

Q. ——in any respect or any employee in your presence that apples were not to be carved up or mutilated?

A. No, sir, I was never talked to about that.

Q. What else, if anything, did you observe that was unusual?

A. Oh, there was also a cluster of chestnuts that came through. I don't know who put them on the belt, but there was a cluster of green chestnuts.

Q. All right. Now, when was it that you noticed this cluster of chestnuts?

A. I would think it was sometime in November.

Q. It was after Elsie Dickerson had been discharged? A. Yes, after Elsie was fired.

Q. Tell us what you observed.

A. Well, they came down on the belt toward me, and I picked them up and Virginia asked me to give them back to her, so she took them and put them in her trimming box and kept them, and then showed them to Ella.

Q. And she showed them to Ella who?

A. Showed Ella Herrerias.

Q. She showed them to Ella Herrerias?

A. Yes.

Q. What did Ella Herrerias do?

(Testimony of Mary Castino.)

A. Well, she thought it was funny. She looked at them and walked off.

Q. To your knowledge, other than Elsie Dickerson, has anybody ever been discharged for putting a core in an apple or decorating an apple?

A. No, sir. [1248]

* * * * *

Q. During the time that you were working for the Company, Mrs. Castino, did you sign any Union authorization or pledge card? A. Yes, I did.

Q. Do you recall when that was?

A. About August the 5th.

Q. About August the 5th, 1954?

A. 1954. [1249]

* * * * *

Cross Examination

Q. (By Mr. Berke): Did you wear a Union button— A. Yes, I did.

Q. —at work? Where did you wear it?

A. On my sweater.

Q. Was it visible? A. Yes, sir.

Q. And when did you get it, Mrs. Castino?

A. I just don't recall when it was.

Q. With reference to the change-over to the single shift, do you know about how long before that happened it was?

A. I just didn't give it much thought.

Q. Would you say it was a day or two before that? A. No, it was before that.

Q. It was? A. Yes.

(Testimony of Mary Castino.)

Q. And you wore it all the time you were at work?

A. Yes, I wore it up until the time of the election.

Q. I see. And you were retained, when they went from two shifts to one shift?

A. Yes, sir. [1250]

Q. And you worked right through the month of December?

A. Right up to the last day, yes, sir.

Q. Now, you say that there was a cluster of green chestnuts sometime in November that came down on the belt? A. Yes.

Q. Now, by "the belt," do you mean the flume that runs past the trimmers?

A. No, it's past the squirrel cage, and there's a short belt—I don't know just how long it is, but it's not very long, long enough for four or five women to work along with each other.

Q. It came down the belt?

A. Down the belt to me, where I was, I was the last one, on the end.

Q. You say you don't know who put it on the belt? Is that correct? A. No.

Q. Do you know whether anyone put it on the belt?

A. Well, evidently someone must have put it there.

Q. You are assuming that?

A. I assume that.

Q. I see. You didn't see anyone put it there?

(Testimony of Mary Castino.)

A. No.

Q. Do you know of your own knowledge that on occasion foreign objects would come into the cannery from the apples brought in [1251] in lugs or boxes?

A. Well, they might have, there might have been something, but I have never seen anything.

Q. Now, during the Halloween'en period when you say you saw some apples carved into pumpkins, did you say Mrs. Herrerias was not present, is that correct? A. No, she wasn't.

Q. She was the floor lady at that time?

A. Yes, sir.

Q. Did you say Edna Hardin was working alongside of you?

A. She worked alongside of me for a while.

Q. She was no longer a floor lady?

A. No.

Q. She was just one of the employees?

A. She was just one of the employees.

Q. Doing the same kind of work as you were?

A. The same thing I was doing.

Q. And later on, in November, when you saw the rubber glove, or the finger of the rubber glove sticking out of a core hole of an apple, Edna Hardin was no longer a supervisor, was she? A. No.

Q. She was still working as one of the employees? A. She was still working there.

Q. And you say that Mrs. Herrerias never said anything about that? [1252]

A. No, she never said anything to me.

(Testimony of Mary Castino.)

Q. Did Mrs. Herrerias see that, of your own knowledge?

A. I don't recall whether she did or not.

Q. Now, on the occasion in August when a rubber mouse came down on the belt, is that again the belt where you were working?

A. Yes, the same one.

Q. Yes. And you picked that up?

A. I picked that up.

Q. Now, you say nothing was said to you by representatives of management or said to anyone about it. Who was the floor lady at that time?

A. Edna Hardin.

Q. Did she see it on the belt at the time?

A. No, she didn't see it because she wasn't standing there where I was.

Q. I see. As I understand it, between October 19th, the date of the election, up to the date Mrs. Dickerson was discharged, you did not observe anything unusual about the apples?

A. Not that I can remember offhand.

Q. Yes. The only thing unusual you saw about the apples was this apple—if you saw it; correct me if I am wrong—Mrs. Dickerson——

A. Yes, I saw that. [1253]

* * * * *

Q. (By Mr. Berke): ——which Mrs. Dickerson plugged with a core, is that right? A. Yes.

* * * * *

Q. (By Mr. Berke): Now, you were asked by

(Testimony of Mary Castino.)

—Strike that. Do you know the day of the week that Mrs. Dickerson was discharged?

A. I don't know the day of the week, but I do know the date, October.

Q. Was it October 25th? The calendar shows that was on a Monday. Does that refresh your recollection?

A. I don't know, don't recall if it was Monday or not.

Q. They didn't work on Sunday out there, did they? A. No, sir.

Q. Now, you were asked by Mr. Magor whether you had observed anything unusual about the apples the day before Mrs. Dickerson's [1254] discharge. If that was a Sunday, it would be a day that you did not work, is that right?

A. That's right.

Q. And the plant was not operating that day?

A. No, I don't think so.

Q. Mrs. Castino, in connection with your job, which you said was to pick off spots and bruises and worms—is that right? A. Yes, sir.

Q. —would some of the apples get by even though you women would try to get all that you could? A. Well, that was our job.

Mr. Magor: Just a moment. I am going to object on the ground it asks for an opinion and conclusion of the witness, would some of the apples get by.

Trial Examiner: I will permit her to testify if she bases it on knowledge.

(Testimony of Mary Castino.)

Mr. Berke: She worked there. It was her job.

The Witness: Well, I worked there, and I worked in other canneries. From my knowledge, sometimes apples would get through, because it was impossible to catch them all.

Mr. Berke: Yes, that's right. No further questions.

Redirect Examination

Q. (By Mr. Magor): Did you catch an apple coming through if a core was sticking out about an inch?

A. Yes, I would. That's what I had to look out for, was apples [1255] with cores in them.

Q. Now, Counsel asked you—Strike that.

Directing your attention to the day that Mrs. Dickerson was discharged, and I direct your attention in my question to working days before that, let's take the first working day before she was discharged.

A. Well, if she was discharged on Monday, the day before would have been Sunday, but we don't work on Sunday. It would have been Saturday.

Q. Let's go to Saturday. I direct your attention to the Saturday before Mrs. Dickerson was discharged. Did you notice anything unusual about the apples on that day? A. No.

Q. Directing your attention to Friday, did you work the Friday before?

A. Yes, I worked Friday.

Q. Did you notice anything unusual about the apples on that day? A. No, sir.

(Testimony of Mary Castino.)

Q. Now, the apple that you saw Ella Herrerias pick up on the day that Mrs. Dickerson was discharged—do you know of your own personal knowledge whether or not that was the apple, or whether that apple was the one that Mrs. Dickerson did anything to?

A. Well, I don't know. I assume. [1256]

Q. You assume it? A. I assume it.

Q. You don't know?

A. I don't know for sure.

Mr. Berke: Just a moment. I object to that. This is General Counsel's witness, on this cross examination.

Trial Examiner: Yes. It doesn't prove anything except to indicate why she has testified in such and such a way. I will let it stand.

Q. (By Mr. Magor): Mrs. Castino, what did you do with these apples that you observed carved up into pumpkin faces?

A. Well, take them—there was a little motor at the end of that table. I'd take them and put them up on there and sometimes I'd take them and finish trimming them and put them down, if they weren't too badly carved.

Q. You put some up on the motor?

A. I put some up on the motor.

Q. Were they in plain sight?

A. Everybody could see them.

Q. Did you see Ella Herrerias throughout the day? A. Ella?

(Testimony of Mary Castino.)

Mr. Berke: Just a moment. I object to that as improper redirect.

Trial Examiner: I will permit it. You may answer.

The Witness: Ella Herrerias and all the other supervisors [1257] saw it.

Trial Examiner: Saw what?

The Witness: Saw the apples that I had put up on the motor, that were carved with faces in them.

Trial Examiner: How many other supervisors were there, that you are talking about?

The Witness: Well, I don't know offhand. I don't know just how many there was. I know there was quite a few men and one woman.

Trial Examiner: Are you through?

Mr. Magor: I am through.

Trial Examiner: Mr. Berke, do you have any more?

Recross Examination

Q. (By Mr. Berke): You say Ella saw them, you are assuming that because she was there?

A. Well, she passed by there.

Q. Yes, but she didn't direct your attention to the fact that she was noticing them that day?

A. No, I just heard her give a chuckle and walk off, that's all.

Q. You don't know what she was chuckling about, do you?

A. Well, naturally, I assumed she was chuckling about the apple.

Q. Yes, that's an assumption on your part?

(Testimony of Mary Castino.)

A. Yes, that's all. [1258]

Mr. Berke: That's all. I have no further questions.

Further Redirect Examination

Q. (By Mr. Magor): Where was she at the time she gave this chuckle?

A. Right in back of me.

Q. And where were those apples?

A. Right up on the motor.

Mr. Magor: Nothing further.

Trial Examiner: I wanted to ask, did you ever see such apples in front of any of the other women?

The Witness: Oh, they passed there before they get to me.

Trial Examiner: No, I don't mean that went by, but some that had been taken out and put up in front of the other women?

The Witness: No.

Trial Examiner: You never saw those?

The Witness: No. [1259]

* * * * *

GLORIA LEE DE FONT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (Mr. Mr. Magor): Mrs. De Font, were you ever employed by Sebastopol Apple Growers Union?

A. Yes.

(Testimony of Gloria Lee De Font.)

Q. When were you first employed by the Company?

A. About July the 15th or the 18th, 1954.

Q. During the time that you were working for the Company, were you married? A. No.

Q. What was your maiden name?

A. Gloria Pate.

Q. Is that P-a-t-e? A. P-a-t-e.

Q. How do you refer to the Company, as Molino, Sagu, or what? A. Molino.

Q. Molino. What shift were you working on when you were first employed? [1260]

A. Day shift.

Q. Do you recall what hours you were working?

A. I believe for a while we started at six, and then we were working from seven till four, and then the last day I went to work, started at eight.

Q. What jobs did you have while you were working for the Company?

A. Most of the time I trimmed at the squirrel cage, but I worked behind the peelers and I worked on the slicer and I worked on the sorting table.

Q. When you worked near the squirrel cage, who worked with you?

A. Gloria Lindsay and Mary Castino.

Q. Do you know Darrel Beavers? A. Yes.

Q. What was his position when you first went to work for the Company?

A. Superintendent.

Q. Had you known Darrel Beavers before?

A. Yes.

(Testimony of Gloria Lee De Font.)

Q. Where had you known of him before?

A. I worked—he was my boss at Manzana's Cannery for three years, I believe it was three years.

Q. And was he Superintendent of Sagu or Molino when you first started to work?

A. Yes. [1261]

Q. Did you have any conversation with Mr. Beavers concerning the Union? A. Yes.

Q. Do you recall when that was, in relation to the date when you first went to work?

A. Well, it was right, either right at the end of July or the first part of August, around the 1st or 2nd.

Q. Do you know what time of day it was?

A. Well, it was a recess, I don't remember if it was in the morning or afternoon recess.

Q. Will you tell us what occurred at that time?

A. He asked me to come up to his office and see him at recess, and I went up to his office.

Q. All right. You went up to his office?

A. Yes.

Q. Where was the office located?

A. Well, you came in the door and you turned left and went up the stairs.

Q. When you got in his office, was anybody else present? A. No.

Q. Just yourself and Mr. Beavers? A. Yes.

Q. Will you now relate for us the conversation that occurred at that time, and tell us what was said and who said it?

A. Well, Darrel asked me, told me that he

(Testimony of Gloria Lee De Font.)

wanted to talk to me about the Union, and so I said well, what about the Union, [1262] and he said well, the Union is going to be in one of these days around here, it is going to be starting up, and, he said, you were supposed to have had something to do with the Union over at Manzana's Cannery; and he said, I don't know if you do or not, I don't want to know, that's your business, whatever you do, he said, but they asked me here if you had anything to do with the Union and I told them no; and he said I don't know if you did or not, but I told them no, because I don't want you to lose your job, and I know that you would lose your job if I had told them yes. And he said that he thought that I—if I went back to Manzana's Cannery that I would be black-balled because of that, because of the Union before. He said he didn't want to know anything, he didn't want me to tell him anything about the Union, as far as what I had done or anything like that, but when the Union came out there, if I would just not get out in front and start anything.

Q. Did he say why he didn't want you to get out in front?

A. He said because it would be bad on him, bad on him, and that I would get fired.

Q. What else was said, if anything?

A. He told me not to say anything to anybody. He said he was telling me that for my own good.

Q. Now, did you—Strike that.

Had you been active for the Union while you were working at Manzana? [1263]

A. Yes.

(Testimony of Gloria Lee De Font.)

Q. Did you sign any Union authorization card at the time you were working for Sagu?

A. Yes.

Q. In 1954? A. Yes.

Q. Do you recall when it was?

A. I believe it was around August the 4th.

Q. Was this before or after you had talked to Darrel Beavers? A. After.

Q. ———that you signed the card? A. Yes.

Q. I show you General Counsel's Exhibit 28 in evidence, and I ask you to look at it, please.

A. Yes, that's what I signed.

Q. Was the card that you signed similar to this card? A. Yes.

Q. Now, after signing the card, Mrs. De Font, what Union activity, if any, did you engage in?

A. I was on the committee.

Q. What committee was that?

A. The day committee, from Molino.

Q. I see. And when were you on the committee, do you recall? A. No.

Q. How long after you signed the card? [1264]

A. I don't know. It was a while after that. I wasn't on the first committee, I was just added to the committee.

Q. I see. And can you tell us, to the best of your recollection today, who the other members of the committee were while you were on it?

A. Gloria Lindsay, Mary Castino, Mr. and Mrs. Storey, Margie—I don't know her last name.

Q. Byrd?

(Testimony of Gloria Lee De Font.)

A. Yes, and Eva Lee. That's all I can think of right now.

Q. How did you happen to be on the committee?

A. I believe that Lila and Mary, Mary Russell or Lila Layman, something like that, they come up and asked us, told us that they wanted us to be on the committee.

Q. When you say "us," who are you referring to?

A. Gloria Lindsay and myself.

Q. Did you attend any Union meetings?

A. Yes.

Q. And do you recall how many you attended?

A. A lot of them.

Q. Was that during the time you were working for the Company?

A. Yes.

Q. Did you ever have any conversations with Mr. Martini with respect to the Union?

A. Yes.

Q. Do you recall when the first—when first you had a [1265] conversation with him?

A. I don't recall the date. He used to talk to us all the time.

Q. When you say "us," who are you referring to?

A. Gloria Lindsay and myself. He didn't always talk about the Union, he used to just talk to us, and sometimes he'd talk about the Union, and sometimes he wouldn't, so I can't say for sure the dates.

Q. How long was it after you signed a Union card that he first talked to you about the Union? That is the only conversation we are concerned with.

(Testimony of Gloria Lee De Font.)

A. Well, it was just after that, I guess. He used to come up to us, our friends—

Q. Just a minute. You say just after that?

A. Yes.

Q. How long after that, approximately?

A. Oh, a day or two maybe.

Q. Where were you talking to him?

A. Where?

Q. Yes. A. Squirrel cage.

Q. And is that where you worked?

A. Yes.

Q. Who else was present at the time?

A. Gloria Lindsay. [1266]

Q. Would she participate in the conversations?

A. Yes.

Q. Do you recall what time of day it was?

A. He used to come in the morning, sometimes, and in the afternoon.

Q. Was this during working hours?

A. Yes.

Q. Will you relate for us what he had to say— or, strike that.

Tell us what was said and who said it.

A. Well, sometimes he'd say our friends were outside, and wanted to know what our friends had to say to us, and then one day he came in and asked us what we thought of the Union, and we told him that we thought we thought the Union was a pretty good deal, and he said that we didn't know what we were getting into, that it wasn't as good as we

(Testimony of Gloria Lee De Font.)

thought it was going to be, and that we might receive more money but we'd have to pay out so much that it wouldn't matter much one way or the other; and he said that each year we received an increase in wages, and we said, yes, we received an increase, five cents an hour more every year, and he said yes, and I said next year we'll be making a whole dollar an hour, and he said that is right, he said, maybe even more, and he told us to think it over.

Q. What was said about these wage increases, what else, if anything? [1267]

A. He said it would be a dollar five at night, probably.

Q. What did he say if the Union got in?

A. Well, he said——

Mr. Berke: Just a moment. I object to that as leading and suggestive.

Trial Examiner: I don't know that you had exhausted her recollection, Mr. Magor.

Mr. Magor: I withdraw the question.

Q. (By Mr. Magor): Have you exhausted your recollection? A. Yes.

Q. Was anything said with respect to wage increases, concerning the Union? A. Yes.

Q. What did he say?

A. He said we would probably receive more money if the Union got in, but that we'd have to pay out in dues and all that stuff and that we wouldn't be getting as much as we thought we would.

Q. What else was said, if anything?

(Testimony of Gloria Lee De Font.)

A. That's all I can remember.

Q. How long did that conversation last, approximately-

A. Ten or fifteen minutes, I guess.

Q. Did you talk to Mr. Martini after that?

A. Yes.

Q. Do you recall when it was, the next time you talked to him? [1268]

A. No.

Q. Did you talk to him each day?

A. Almost every day, every time he came in, that he came by, he'd come over and talk to us.

Q. Did he talk about the Union each time that he talked to you?

A. Every time, did you say?

Q. Yes. A. No.

Q. Did he talk about the Union after that?

A. Yes.

Q. All right. Do you recall approximately when it was, with relation to this conversation that you have just related, that he talked about the Union?

A. Well, he gave us a clipping, a newspaper clipping, and that was after Mrs. Storey was fired, and he told us to read that, and to show it to the Union officials, and then we showed it around the place, the plant there, and showed it to them, and it had something to do about the Union back east, spending all the money that they got in, or something. I didn't pay too much attention to it. And he'd come back—

Mr. Berke: Well, I think just about all this is subject to a motion to strike as non-responsive.

(Testimony of Gloria Lee De Font.)

Trial Examiner: Well, I will let it in. I let it in before. I will let it stand. [1269]

Q. (By Mr. Magor): You say this conversation was after Mrs. Storey was discharged?

A. Yes.

Q. Did he give you a newspaper clipping at that time? A. Yes.

Q. And have you related the full conversation at that time?

A. I don't know, there might have been more. That's all I remember about it.

Q. Was this during working hours?

A. Yes.

Q. Do you recall how long he was talking to you at that time? A. No.

Q. Did you have any other conversations with Mr. Martini that you recall, with respect to the Union?

A. That's all I can think of right now.

Q. Have you exhausted your recollection?

A. Yes.

Q. Was there any conversation with respect to his closing down his operations? A. Oh, yes.

Q. Do you recall when that was?

A. That was when he was talking about the regular wage increases every year, right after he finished that, we asked him if he was going to close down the plant, and he said that he'd closed down his plant in Santa Rosa and he would do the same at Molino if we [1270] was to go Union.

(Testimony of Gloria Lee De Font.)

Q. Did you wear a Union button while you were working? A. Yes.

Q. Do you recall when it was that you first wore such a button?

A. I first wore it on the 14th. I had two on my hat and two on my collar.

Q. 14th of what month? A. October.

Q. Where did you receive the button, where did you get the button? A. At a Union meeting.

Mr. Berke: What is the answer? I didn't get it.

The Witness: Union meeting.

Q. (By Mr. Magor): I show you General Counsel's Exhibit 31 in evidence and I ask you whether the button or buttons that you had were similar to that? A. Yes.

Q. After you got it at the Union meeting, or got them at the Union meeting, what did you do with the buttons?

A. Well, I got a lot of them and I put them in the jockey box in my car.

Q. Put it in what?

A. In the jockey box in my car.

Q. I see. Then what did you do? [1271]

A. Then I gave them to people that didn't get them.

Q. And where did you give them to people that didn't get them? A. At the cannery.

Q. At the cannery? A. Parking lot.

Q. And did you say you wore buttons yourself?

A. Yes.

Q. Where did you wear them?

(Testimony of Gloria Lee De Font.)

A. I wore one on each side of my collar and one on each side of my hat.

Q. Were they plainly visible? A. Yes.

Q. Did you work on October the 15th?

A. Yes.

Q. Did Gloria Lindsay work on that day?

A. No, no.

Q. Do you know why?

A. She was sick.

Q. I see. Did you talk to any representative or supervisor of the Company with respect to Gloria Lindsay? A. Yes.

Q. Who were you talking to?

A. Eva Lee. I told her that she was sick.

Q. What did Eva Lee have to say?

A. She said all right, thank you. [1272]

Q. Did you work the full shift on October 15th? By that I mean did you work the full day?

A. Yes.

Q. What occurred that day?

A. Eva Lee told us that there was going to be a meeting and for us to go across the street to the building across the street.

Q. And what time of day was it that Eva Lee told you that, to the best of your recollection?

A. I believe it was at four, or a little before four she told us.

Q. And when you say "us," who are you referring to?

A. Mary Castino and myself. We were both working there.

(Testimony of Gloria Lee De Font.)

Q. What did you do then?

A. We went over there.

Q. Did you punch out at all?

A. I don't remember punching out.

Q. And you say you went over there; where did you go?

A. Over to the building right across from the cannery.

Q. Who was present at the time?

A. Everybody.

Q. By "everybody," who are you referring to?

A. The night shift and the day shift and Mr. Martini, Mr. Bondi, people that were in the office.

Q. And when you refer to the night shift and the day shift, are you referring to the employees of the night shift and the [1273] day shift? A. Yes.

Q. Tell us what occurred at that time, tell us what was said and who said it.

A. Well, Mr. Bondi talked first I believe and he said that there was going to have to be a lay-off, and he thanked everybody for working, and they hoped everybody would come back next year, and he said they were going to have a dinner at the end of the season, for everybody to come, and then somebody else talked or read the list or something, Mr. Martini said something, and then they read a list of names off of the people who were supposed to return to work on Monday.

Q. Was your name read? A. Yes, it was.

Q. Was Gloria Lindsay's name read?

A. No.

(Testimony of Gloria Lee De Font.)

Q. Did you tell Gloria Lindsay about this meeting?
A. Yes, yes.

Q. Did you tell her her name was not read?

A. Yes.

Q. Did you go to work on the following Monday?
A. Yes.

Q. How did you get to work on that day?

A. Well, Gloria Lindsay wanted to use my car, so I told her she'd have to take us to work. [1274]

Q. Did she drive you out?
A. Yes.

Q. What time of day did you go to work on that day?
A. Eight.

Q. Tell us what you did when you got there.

A. Put my apron and gloves on, punched in.

Q. At the time clock?

A. Yes. Went over to the squirrel cage.

Q. You say you went to the squirrel cage?

A. Yes.

Q. Is that the place where you had been working?
A. Yes.

Q. Was there anything unusual about your attire on that day?

A. Yes, I had my Union buttons on.

Q. How many buttons did you have?

A. Four.

Q. Where were they?

A. One on each side of my collar and one on each side of my hat.

Q. Tell us what occurred at that time.

A. Well, we started working, and then Charlie came by—

(Testimony of Gloria Lee De Font.)

Q. Charlie who?

A. I believe his name is Williams. I'm not sure.

Q. What position did he have with the Company, to your knowledge?

A. Some kind of a boss. [1275]

Q. And you say he came by; where did he come?

A. Well, he came from over in the middle of the building. I don't know where he was coming from, but he came right by me.

Q. All right. And did he engage in any conversation with you at the time? A. Yes.

Q. Was anybody else present who engaged in such conversation? A. Pardon?

Q. Did anybody else participate in the conversation? A. No.

Q. Tell us what was said and who said it.

A. Charlie Williams asked me what I was doing there, and I said I was working, and he said, "Well, you are not supposed to be here." And I said, "Well, my name was on the list to report to work." And he said, "No, it wasn't." And I said, "It was, too." And so he said, "Well, we will see about that," and he turned around and walked upstairs.

Q. All right. You say he turned around and walked upstairs. Did you observe him?

A. Yes, I was watching him.

Q. All right. Where did he go?

A. He went up to the office, the Superintendent's Office.

Q. Where is the Superintendent's Office located?

A. Right up the stairs, the first door as you go

(Testimony of Gloria Lee De Font.)

up the stairs, and it's got glass around it. [1276]

Q. It has glass around it? A. Yes.

Q. That is, the office? A. Yes.

Q. Can you see through the glass?

A. Yes.

Q. Approximately how far away from you was the office?

A. Well, you had to go over a little way, then you had to go upstairs. It wasn't too far.

Q. I see. And what did you observe?

A. Well, he talked to Ella and he talked to Duckworth, but I don't know which one of them he talked to first, and I saw him pick up a piece of paper and look at it. Then he came downstairs and talked to either Ella or Duckworth, whichever one he hadn't talked to already.

Trial Examiner: That is Ella Herrerias?

The Witness: Yes, and then he walked back over to me and said that he was sorry, that my name was on the list, but that they had made a mistake, and that I wasn't supposed to have been there, and he said, "You will have to punch out and go home." I said, "If I have to punch out and go home, you will have to pay me for reporting to work," and he said, "We will pay you for two hours," so I said, "Thank you," and I punched out and went over to the office.

Q. Now, did you see Mr. Martini on this occasion? [1277]

A. I didn't see him right then. I went to the office and asked if he was in yet.

(Testimony of Gloria Lee De Font.)

Q. I see. Then what happened?

A. And they said no, and so then I went and phoned Gloria Lindsay and told her to come back and pick me up, and so then I waited inside, and she came and we went outside, and Mr. Martini was just coming in. [1278]

* * * * *

Q. (By Mr. Magor): Now, was anybody present with you at the time? A. Yes.

Q. Who was present?

A. Gloria Lindsay and Ruthie Deal, or something like that.

Q. Did Gloria Lindsay engage in the conversation? A. No.

Mr. Berke: Excuse me a minute. Can I get the name of that other person? [1279]

(Answer read.)

Q. (By Mr. Magor): Did Ruthie Deal or something engage in the conversation? A. No.

Q. Do you recall what time of day it was?

A. Well, it might have been nine o'clock by then. I'm not sure.

Q. Will you now relate for us today the conversation that occurred at that time and tell us what was said and who said it.

A. I told Mr. Martini that I had just been laid off and I wanted to know why I had been laid off, and he said that he didn't know, and he said, "Was your name on the list?" and I said "Yes, it was." I said, "I came to work and they told me that they had made a mistake," and he said that they—oh, I

(Testimony of Gloria Lee De Font.)

told him that they were hiring other people in there right now, after they had laid me off, and he said he didn't know, and so I said — he said that they were laying people off in accordance with seniority. I said, well, there's people that worked here for three and four years that were laid off the other day, and he said, well, the years before don't count, it's just this year, and I said, well, I came to work on the first day and worked this year and he said, well, I don't know, I just don't know.

Q. Is that all he said at that time?

A. That's all I remember him saying. [1280]

Q. On October the 19th, 1954, the National Labor Relations Board held an election at the Respondent's plant. Did you vote in that election?

A. Yes, I did.

Q. What, if anything, happened to your ballot?

A. It was challenged.

Q. Now, after that date that you have related, the day that you last talked to Mr. Martini,—Do you recall that testimony? A. What?

Q. Do you recall that testimony you just gave a few moments ago? A. Yes.

Q. After that, did you ever go back to the plant at all? A. Yes.

Q. Do you recall when it was?

A. After I voted?

Q. Yes.

A. Well, I took my apron and gloves back, but I don't remember just when it was.

(Testimony of Gloria Lee De Font.)

Q. How long was it after the date of the election?

A. Oh, maybe three weeks. I am not sure.

Q. I see. Did you get paid for working on that day? A. Yes.

Q. And was that on that occasion?

A. That I went back over there? [1281]

Q. Yes.

A. No, I believe I got that in the mail, but I didn't get it right away, and I phoned over and asked them about it, and then they mailed it to me, I think.

Q. And for how many hours did they pay you?

A. Two.

Q. You say you brought your apron and gloves back? A. Yes.

Q. And who did you give them to?

A. Not my gloves, my hat; my apron and hat, I'm sorry.

Q. Your hat. Who did you give them to?

A. I think I gave them to Ella.

Q. Ella Herrerias? A. Yes.

Q. Any conversation occur at the time?

A. She just asked me how I was.

Q. Now, I may have asked you this question; if so, why,——

On this date of the meeting, on October the 15th, you say Gloria Lindsay's name was not read?

A. Not read.

Q. Did you tell her her name was not read?

A. Yes. [1282]

* * * * *

(Testimony of Gloria Lee De Font.)

Cross Examination

Q. (By Mr. Berke): What time did you go out to Sagu on the morning of Monday, October the 18th?

A. I believe it was at—What time did I go there or—

Q. Yes, what time did you go there?

A. —or what time did I start work? I don't know.

Q. You haven't any idea? You are shrugging your shoulders. By that you mean no?

A. I don't know what time I arrived there, no.

Q. All right. When you arrived there, what did you do?

A. I went inside and put my apron and gloves on and punched in and went over and stood at the squirrel cage.

Q. There was a card in the rack for you, was there? A. Yes. [1284]

Q. With your name on it? A. Yes.

Q. What time did you punch in?

A. It was probably five minutes to eight.

Q. Five minutes to eight? A. Probably.

Q. The starting hours were what at that time?

A. I believe they were from eight to five.

Q. Then, after your discussion with Mr. Williams, did you punch out? A. Yes.

Q. What time did you punch out?

A. I don't know.

Q. Approximately?

A. Well, I'd only been working for a little bit.

(Testimony of Gloria Lee De Font.)

Q. How much is a little bit?

A. Maybe ten minutes.

Q. So you punched out shortly after eight o'clock that morning?

A. As far as I remember.

Q. Now, you were asked by Mr. Magor whether there was anything unusual about your attire on that morning, and you said you had four buttons on, is that correct? A. Yes.

Q. Did I misunderstand you—and correct me if I did—that shortly before October 15th you had worn four buttons, one on [1285] each side of your hat and on your apron?

A. Before the 15th, did you say?

Q. Yes. A. Yes.

Q. So that you had the same number of buttons on Monday, October the 18th, as you had had on prior to October the 15th? A. Yes.

Q. Is that the only thing that was unusual about your attire on Monday, October the 18th?

A. Yes.

Q. You wore the same buttons, that is, the same four buttons on October the 18th that you wore prior to October the 15th? A. Yes. [1286]

* * * * *

Q. Now, going to the conversation you say that you had with Mr. Martini about a day or two after August the 4th, that was the time, wasn't it, that you mentioned, a day or two after August the 4th was the first conversation you had with him?

A. Yes.

(Testimony of Gloria Lee De Font.)

Q. What was it that you said about getting an annual increase? A. Getting what?

Q. An annual increase.

A. Was that what I said?

Q. Yes. A. That Mr. Martini said.

Q. Well, what was it? Did I understand you to say that you [1287] said—

A. We'd receive an increase in wages each year, yes. Mr. Martini said that they received a regular increase in wages every year.

Q. Had you asked him about the wage increase?

A. No.

Q. What did you say to him then, when he said that?

A. I said yes, we'll get a whole dollar an hour next year.

Q. You said that? A. Yes.

Q. And what did he say in response to that?

A. He said, yes, you probably will.

Q. And then, was it after that that you asked him if he was going to close down the plant?

A. As far as I remember, it was.

Q. It was you that asked him that, or was it Gloria Lindsay that asked him?

A. I don't remember.

Q. One of the two of you asked him?

A. We were both—all talking.

Q. Well, one of the two of you asked him that question? A. Yes. [1288]

* * * * *

Q. All right. Now, on the occasion of your con-

(Testimony of Gloria Lee De Font.)

versation with Mr. Beavers, can you tell us about when that took place?

A. When the conversation took place?

Q. Yes.

A. It was the end of July, or around the 1st or 2nd of August sometime.

Q. And that was about two weeks after you had gone to work [1289] there? A. Yes.

Q. And you had known Mr. Beavers for several years, had you?

A. I had worked under him for either two or three years at Manzana.

Q. I see. Where is Manzana located?

A. Well, it is out at Graton, just a little ways from Graton. Green Valley Road, I think is the name of the road.

Q. That is just a few miles from Molino, isn't it? A. Yes.

Q. How long was Mr. Beavers Superintendent at Sagu, or Molino, if you recall?

A. I don't remember exactly how long.

Q. Just for a short period?

A. Well, I couldn't say for sure. It wasn't too long, but it was more than a month, as far as I can remember.

Q. As far as you recall, he wasn't Superintendent at Sagu or Molino for more than a month, is that right?

A. Well, he was there at least a month, but I couldn't say for sure how long.

Q. And this reference that you say he made to

(Testimony of Gloria Lee De Font.)

black-balling, that was in connection with work at Manzana, was it? A. Yes.

Q. Going back to the meeting at the warehouse on October 15th, you say Mr. Bondi spoke first?

A. As far as I remember, he did.

Q. And then do you recall who spoke after him?

A. I know somebody spoke. I don't remember if it was Mr. Martini or somebody else.

Q. I see. Do you recall whether Mr. Bondi, in speaking, read a letter?

A. I don't remember. I think Mr. Martini read the letter. I'm not sure.

Q. Not sure. Don't know whether Mr. Martini spoke after Mr. Bondi, or did he speak last?

A. I said I don't remember if it was the other man or Mr. Martini that spoke after him. [1291]

* * * * *

Trial Examiner: Did you get a wage increase in 1954?

The Witness: Yes.

Trial Examiner: When did you get that?

The Witness: Well, every year we get a five cent raise, so it must have been right at the beginning of the season.

Trial Examiner: Had you worked there before?

The Witness: No, but I worked at Manzana's Cannery before for three years, I think it was, either two or three; I started out at eighty cents an hour, the next year I got eighty-five, the next year ninety, and then ninety-five.

(Testimony of Gloria Lee De Font.)

Trial Examiner: Well, in 1954, at the beginning of the season, what were you getting?

The Witness: I think I was getting ninety-five, as far as I can remember.

Trial Examiner: Then, if you got an increase during that year, you were raised to one dollar, were you?

The Witness: No, I think we started out at ninety-five cents. We got the increase before we started working, usually.

Trial Examiner: Well, you don't remember, then, when you did get the increase?

The Witness: As far as I remember, it was before we started working. [1293]

* * * * *

JOHN FIORI GREGORI

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [1312]

* * * * *

Cross Examination

Q. (By Mr. Berke): Mr. Gregori, were you last year an officer of the Sebastopol Apple Growers Union? A. No.

Q. Were you a member of the Board of Directors of that organization? A. No.

Q. Were you an employee of that organization?
A. No, no.

Q. Are you an officer this year? A. No.

Q. Are you a Director this year? A. No.

Q. Are you an employee? A. No. [1313]

* * * * *

(Testimony of John Fiori Gregori.)

Q. (By Mr. Berke): Mr. Gregori, do you know a Mrs. Marie Tripp? A. Yes.

* * * * *

Q. (By Mr. Berke): Did you know her when she worked for the [1315] Sebastopol Apple Growers Union? A. Yes.

Q. Did you ever have a conversation with her in which you told her that Sebastopol Apple Growers Union were taking apples to the Sebastopol Co-operative Cannery as fast as they can so as to clear out the warehouse, and if the Union got in they would shut down the cannery? A. No.

Q. Did you make any statement in substance or effect along those lines to her? A. No.

Q. Did you haul any apples for Sebastopol Apple Growers Union last year? A. Yes.

Q. Where did you take those apples to?

A. I took them to the co-op driers.

Q. The co-op driers? A. Yes. [1316]

* * * * *

Q. And will you tell us, if you know, why apples were being sent to the Sebastopol Co-operative driers?

A. Well, the few that I hauled there was awful bad, and they were just about all rotten.

Q. When you say "awful bad," describe the condition of them.

A. Well, the apples were not any good for any use at all.

Q. They couldn't be sold as fresh fruit?

A. No, absolutely. [1318]

* * * * *

GEORGE LAWRENCE SILVA

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: Will you state your full name, please?

The Witness: George Lawrence Silva.

Trial Examiner: Do you spell your name with a "w" or a "u"—Lawrence?

The Witness: "W."

Trial Examiner: And your home address?

The Witness: 660 Britton Street, Sebastopol.

Trial Examiner: That is Sebastopol, California?

The Witness: Yes, sir.

Q. (By Mr. Karasick): Mr. Silva, did you ever work for Sebastopol Apple Growers Union?

A. Yes, I have.

Q. When did you begin working there?

A. 1951.

Q. What was your job at that time?

A. Fork-lift driver, cold storage. [1341]

Q. You remained at the Company until what time, what year? A. May, '54.

Q. And were you discharged, or did you quit?

A. I quit.

Q. Now, it was a voluntary quit on your part?

A. Yes.

Q. And you are now employed elsewhere?

A. Yes.

(Testimony of George Lawrence Silva.)

Q. Now, in 1952, did you have the same or a different job than you had in 1951?

A. Different job.

Q. What was your job in 1952?

A. Plant Superintendent.

Q. And when were you made Plant Superintendent? A. April, '52.

Q. And how long did you hold the job of Plant Superintendent? A. Till May of '54.

Q. Until you left? A. Until I left.

Q. As Plant Superintendent, what did you have jurisdiction over?

A. Over the cannery, the cold storage and the warehouses.

Q. In 1952, do you recall a time when the Company reduced operations to one shift?

A. Yes. [1342]

Q. It had two shifts up to then, a day and a night shift, is that correct? A. Yes. [1343]

* * * * *

Q. (By Mr. Karasick): Do you recall that the plant reduced operations to one shift in 1952?

A. Yes.

Q. Now, when that was done, under whose supervision was the reduction accomplished?

A. Under my supervision.

Q. And how did you reduce to one shift at that time? In what manner?

Mr. Berke: Just a moment. I object to that as not proper evidence at this part of the case.

Trial Examiner: Overruled.

(Testimony of George Lawrence Silva.)

Mr. Karasick: You may answer.

A. We laid off the night shift.

Q. (By Mr. Karasick): Now, in 1953, do you recall that there was a day and a night shift during that season? A. Yes.

Q. Before the total shutdown of production operations that season, did the Company also reduce to one shift? A. Yes.

Mr. Berke: Same objection. [1344]

Trial Examiner: Overruled.

Q. (By Mr. Karasick): At that time was the reduction to one shift under your supervision?

A. Yes.

Q. As superintendent. How was the reduction accomplished at that time, in what manner?

Mr. Berke: Same objection.

Trial Examiner: Overruled.

A. The night shift was laid off.

Q. (By Mr. Karasick): Did you lay any of the day shift off in 1952? A. No.

Q. Did you lay—and I'm talking about the time when the reduction to the shift occurs, you understand. A. Yes, I understand.

Q. With reference to 1953, the same question.

A. Yes.

Q. Did you lay any of the day shift off in 1953?

A. No.

Q. At the time the two shifts were reduced?

A. No. [1345]

* * * * *

(Testimony of George Lawrence Silva.)

Cross Examination * * * * *

Q. (By Mr. Berke): You say that in 1952, when the Sebastopol Apple Growers Union went from two shifts to one shift, only the night shift was laid off? A. Yes.

Q. No one from the night shift was put on the single shift? A. Yes, they were.

Q. They were? So then everybody on the night shift was not laid off, is that correct?

Mr. Karasiak: Object. That is argumentative.

Trial Examiner: No, overruled.

A. We used what we could from the night shift on the day shift.

Q. (By Mr. Berke): Yes, and was the same thing true in 1953? A. Yes, yes.

Q. That is, you took people from the night shift and put them on the single or day shift, as you call it? A. Yes, yes.

Q. And you did that, isn't it true, Mr. Silva, in both years if the people on the night shift wanted to work on that day shift, is that right?

A. Would you give me that question again?

Mr. Berke: Yes. Would you read it.

(Question read.)

The Witness: I don't understand the question.

Q. (By Mr. Berke): Well, let me put it to you this way: Weren't there some people on the night shift when you went to the single shift, both in 1952 and 1953, who did not want to work for some reason or other on the so-called day shift, the single shift?

A. Yes, there were several.

(Testimony of George Lawrence Silva.)

Q. I see. You used people on the night shift who did want to work?

A. Yes, we did, if we could use them.

Q. Yes, and you did use them, didn't you?

A. Yes. [1349]

* * * * *

Q. 250. Now, did they have two shifts in 1951, do you remember? A. No. [1352]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Karasick): At the time of the reduction to one shift, night shift employees who wanted to continue working were used on the day shift only to the extent that you had vacancies on the day shift, isn't that so? A. Yes.

Q. The mere desire of a night shift employee to continue working wouldn't make you create a job on the day shift for them, would it?

A. No. [1357]

* * * * *

CARMELITA MONTAFI

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [1358]

* * * * *

Q. (By Mr. Karasick): Did you ever work for Sebastopol Apple Growers Union? A. Yes.

Q. When did you begin work there?

A. Began the season of 1952.

Q. And what was your job at that time?

(Testimony of Carmelita Montafi.)

A. Trimmer-peeler.

Q. Worked in the production end of the cannery?
A. Yes.

Q. In 1953, did you also work at the Company?

A. Yes.

Q. Was your job the same or different during that 1953 season?
A. I was floor lady, 1953.

Q. And, to the best of your recollection, when were you made floor lady that year?

A. Beginning of the season of 1953.

Q. Did you continue to work for all of that season?
A. Yes.

Q. Were you there as a floor lady at the time the Company reduced—Strike that question.

During the 1953 season, did the Company have a day and a [1359] night shift?
A. Yes.

Q. Towards the end of the season, did the Company reduce operations to one shift?
A. Yes.

Q. Were you there as floor lady at the time that happened?
A. Yes.

Q. Will you tell the Examiner which employees were laid off at that time; how did you choose the employees who would be laid off?

A. Well, Mrs. Herrerias, Ella Herrerias, chose the women she wanted from the night, for me to put on the day, and I took—I put on what room I had, as many girls as I had room for.

Q. Now, will you try to talk a little more slowly, please.
A. Yes.

Q. Thank you. Were any employees on the day shift laid off at that time?
A. No.

(Testimony of Carmelita Montafi.)

Q. Employees on the night shift, however, were; is that right? A. Yes.

Q. There were vacancies on the day shift, and they were filled in with night shift employees, is that the way it was done? A. Yes. [1360]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): Now, in 1953, you say, when they reduced from two shifts to one shift that Mrs. Herrerias chose the women she wanted to go on that one shift? A. From her night shift.

Q. She—Mrs. Herrerias was the floor lady on the night shift at the time? A. Yes. [1364]

* * * * *

JOANNE SCHWARTZ

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Magor): You say your name at the present time is Joanne Schwartz?

A. Yes.

Q. Your maiden name was Joanne Chames?

A. Yes. [1368]

Q. Were you married at the time—Strike—that. Were you ever employed by Sebastopol Apple Growers Union? A. Yes.

Q. Do you recall when you were first employed?

A. It was about the end of July.

Q. Of what year? A. '54.

(Testimony of Joanne Schwartz.)

Q. At the time that you were working for the Company, were you married at that time?

A. No.

Q. During the time that you worked for Sebastopol Apple Growers Union, did you ever sign a Union authorization card? A. Yes.

Q. Do you recall when it was? A. No.

Q. How long was it after you went to work for the Company, approximately?

A. Oh, about three weeks, I guess. [1369]

* * * * *

Q. Did you work a full shift all the time you were working for the Company?

A. Yes, until school started.

Q. Do you recall when school started, to the best of your recollection?

A. I think it was the 15th of September.

Q. 1954? A. Yes. [1370]

* * * * *

Q. And were you ever present at any time—or, strike that.

Were you ever present during any conversation at which Mr. Martini was present, when Mrs. Storey's name was mentioned?

A. Yes, there was one day in the office.

Q. Do you recall when that was?

A. Well, I think it was a Saturday.

Q. And was this before or after school started?

A. This was after school started.

Q. How long after school started, to the best of your recollection?

(Testimony of Joanne Schwartz.)

A. Oh, about a week and a half, I guess.

Q. And you say you were in the office?

A. Yes.

Q. What office was that?

A. The main office, the big office.

Q. Of the Company? A. Yes.

Q. Do you recall what time of day it was?

A. It was in the afternoon, after lunchtime.

Q. Was anybody else with you at the time?

A. Yes, Eloise was.

Q. Eloise who? [1371] A. Mounger.

Q. Was anybody else present in the office?

A. Well, just the help.

Q. Do you recall who they were, or what their names were?

A. I know there was a little dark girl and a white-haired man and a guy they called Baldy, the timekeeper, and I guess — I think there's another lady, too.

Q. I see. Where were you and Eloise standing?

A. Well, we were standing just as you go in, there's a desk there, you know.

Q. I see.

A. We were standing, talking to the lady.

Q. Did you see Mr. Martini at the time?

A. No.

Q. Did he come in the office at all?

A. Yes.

Q. Will you describe what happened and what was said?

A. Well, he came in and he was real mad.

(Testimony of Joanne Schwartz.)

Q. Who was real mad? A. Mr. Martini.

Mr. Berke: Now just a moment. I move that be stricken.

The Witness: He was real mad——

Trial Examiner: Just a minute.

The Witness: He was angry.

Trial Examiner: Strike that, and ask for the usual indicia. [1372]

Mr. Magor: Surely.

Q. (By Mr. Magor): Describe how he looked and what he did.

A. O.K. He was real angry and curt.

Mr. Berke: I move that be stricken.

Trial Examiner: Well, I will strike the answer. What Counsel is asking for is those indications of anger which you would normally recognize, if there were any. How did you know he was angry, in other words?

The Witness: Well, he swore.

Trial Examiner: Is that the only thing?

The Witness: Well, when they act mad, I guess—I just can tell when they are mad. I mean, I don't know what you want me to say, but——

Trial Examiner: Well, am I mad?

The Witness: No, he is.

Mr. Berke: I am? Well, on the basis of that, I think we ought to disqualify the witness, because internally I was chuckling.

Mr. Karasick: I think the girl deserves a silver star.

(Testimony of Joanne Schwartz.)

Trial Examiner: I will turn it back to you, Mr. Magor.

Mr. Magor: Surely.

Q. (By Mr. Magor): Would you describe his voice as he spoke? A. Well, it was harsh.

Q. Was he talking in a normal tone of voice or otherwise? A. No. [1373]

Mr. Berke: Just a moment. I object to that. What is Mr. Martini's normal tone of voice?

Trial Examiner: Well,—

Mr. Berke: It calls for an opinion and conclusion.

Trial Examiner: I suppose that means the speaking voice, normal speaking voice.

Mr. Berke: What is a normal speaking voice for an individual? We don't all speak in the same tone.

Trial Examiner: The one that we have heard here.

Mr. Berke: Was she present?

Trial Examiner: I will permit it. I think that's within the proper range. You may answer.

The Witness: And he was—he swore, and he said that he was sick and tired of everyone telling him what to do and that he was going to get rid of Mrs. Storey because she talked too much about the Union and it wasn't good.

Q. (By Mr. Magor): What else was said, if anything? A. I guess that was all.

Q. What did you do then?

A. We left, and then we went back to the cannery.

(Testimony of Joanne Schwartz.)

Q. Did you talk to Edna Hardin at that time?

A. Yes, I asked her——

Q. Where were you talking? Just a minute. Just wait a minute. You say you did talk to Edna Hardin?

A. Yes. [1374]

Q. Where were you talking to her?

A. In the cannery.

Q. Was anyone else present at the time?

A. No.

Q. How long was it after you left the office that you talked to Edna Hardin, that you were talking to Edna Hardin, approximately?

A. Oh, I guess about ten minutes.

Q. Will you tell us now, to the best of your recollection today, what was said at that time, what you said and what she said?

A. Well, I asked Edna if Mrs. Storey was fired, and she said yes, she'd been fired, and I asked her why and she said, well, they couldn't have that kind of people around that talk about the Union all the time.

Q. Was anything else said, to your recollection?

A. No.

Q. Were you ever present at any time, Mrs. Schwartz, when the equipment about the slicer was discussed with Mr. Martini?

A. Yes.

Q. Do you recall when that was?

A. Well, something they put in wrong.

Q. Do you remember when it was?

A. Oh, it was in the middle of the week.

Q. And do you recall what month it was? [1375]

(Testimony of Joanne Schwartz.)

A. Well, it was after—no.

Q. What was the last day on which you worked for the Company, if you recall?

A. Well, it was about two weeks after school started.

Q. Well, in relation to that, do you recall now when this conversation was concerning the equipment on the slicer?

A. Well, it was after school started.

Q. It was after school started. Where were you at the time?

A. Well, I was working with this lady, Eleanor, with her on the slicer.

Q. And do you know Eleanor's last name?

A. No.

Q. Was she an employee of the Company?

A. Yes.

Q. Do you recall what time of day it was?

A. It was in the afternoon.

Q. And you say you were working—Were you working on the slicer at the time?

A. Well, it's not the slicer, it's that belt that goes up into the big kettles.

Q. I see. What was that belt used for?

A. Well, I guess it's—we have to pick out the little chips in it.

Q. Was there anything wrong with it?

A. Well, the screen wasn't letting the chips fall out. [1376]

Q. The screen wasn't what?

A. Letting the chips fall out.

(Testimony of Joanne Schwartz.)

Q. Out of what?

A. Out of the apple slices.

Q. I see. And what chips are you referring to?

A. Oh, just like little pieces of core and little pieces of apples that aren't supposed to go in the applesauce.

Q. Was there any conversation with Mr. Martini with respect to this?

A. Well, she told — Eleanor told Mr. Martini that——

Mr. Berke: Wait a minute.

A. (Continuing): ——the screen had to be changed.

Mr. Berke: Now, wait a minute. No foundation laid to show Mr. Martini was present, and who else was present.

Trial Examiner: Inquire a little further on that, Mr. Magor.

Q. (By Mr. Magor): Was Mr. Martini present at the time? A. Yes.

Q. Were you present? A. Yes.

Q. Was Eleanor present? A. Yes.

Q. Was anybody else present at the time?

A. The rest of the girls that worked on the slicer.

Q. Did they engage in the conversation? [1377]

A. No, they just listened.

Q. Do you recall who these girls were, their names? A. No.

Q. Will you tell us now, to the best of your recollection today, what was said and who said it?

(Testimony of Joanne Schwartz.)

A. Well, she told him that the screen had to be changed, and he said he couldn't stop everything and change it, but he would change it, and that was about in the middle of the week, and they didn't get around to changing it until Saturday.

Mr. Berke: I move the last part be stricken as not responsive.

Trial Examiner: Sustained, granted.

Q. (By Mr. Magor): Was the screen changed?

A. Yes.

Q. When was it changed, after this conversation with Mr. Martini? A. On a Saturday.

Q. How many days later was it, after Eleanor had told him about the screen?

A. It was about three days.

Q. Were you working for the Company at the time a lay-off occurred on October 15th, 1954?

A. Yes.

Q. Was there a meeting held at that time?

A. Well, just before quitting time—well, we met in—I [1378] guess in the warehouse it was.

Q. Was your name called to go back to work?

A. Yes. [1379]

* * * * *

Cross Examination

Q. (By Mr. Berke): When was it that you were in Mr. Martini's office, when you heard this conversation about Mrs. Storey?

A. It was on a Saturday afternoon.

Q. What month? A. In September.

(Testimony of Joanne Schwartz.)

Q. Well, when in September, could you tell us the date more precisely?

A. Well, it was about, I guess, about the 20th or something—around the 20th of September.

Q. And you were in Mr. Martini's office?

A. Well, the main office I was in. [1380]

Q. And this was in the afternoon, was it?

A. Yes.

Q. About what time?

A. A little—just about—oh, I guess a little bit after one o'clock.

Q. Shortly after one. This was during working hours, was it?

A. Well, we weren't going to go back to work.

Q. Who is "we"? A. The whole crew.

Q. Oh, was there a reason why the whole crew wasn't going to go back to work?

A. Well, we were having trouble or something and we weren't working. I think that's what it was.

Q. Well, what was this trouble you were having?

A. I don't know, something to do with the cannery. [1381]

* * * * *

Q. (By Mr. Berke): Does this have something to do with Mrs. Storey?

A. Well, this is when she was fired.

Q. This is when she was fired?

A. When I was in the office. Isn't that what you were talking about?

Q. Yes, I am talking about the time you say you were in the main office; and this was the same time

(Testimony of Joanne Schwartz.)

that she was fired? A. Yes.

Q. And what were you in the office for?

A. I don't remember.

Mr. Magor: Objected to on the ground it is immaterial.

Trial Examiner: Overruled.

Q. (By Mr. Berke): Was it——

Trial Examiner: What was the answer?

The Witness: I don't remember what the reason was.

Q. (By Mr. Berke): Was it just you and Eloise that were in the office?

A. Well, we went in there together, but there was office help there.

Q. Yes, but I mean from the employees in the cannery itself? [1383] A. Yes; oh, yes.

Q. Just the two of you? A. Yes.

Q. And where were you in the office?

A. Well, just at the desk.

Q. You mean by that this little vestibule as you enter the door, where there is a partition, and that looks like a desk? A. Yes.

Q. And was there a partition, do you remember, to the right of you that runs along to the wall where the door is?

A. I think there was, yes.

Q. And do you remember, on this partition were there various posters and papers that were held in place either by a thumbtack or something else?

A. Yes.

Mr. Magor: Just a moment. I move to strike the

(Testimony of Joanne Schwartz.)

answer. Objected to on the ground it is immaterial.

Trial Examiner: Overruled.

Q. (By Mr. Berke): Now, which way did Mr. Martini come in while you were there?

A. Well, he came in from that—the door.

Q. Same door that you had come in?

A. Yes.

Q. And where did he go when he came in?

A. Well, he came in and he went behind the desk and he was [1384] talking to this man.

Q. Do you know who the man is he was talking to?

A. Well, I think there was a couple of men there, but one was that white-haired man that is around there all the time.

Q. Does this refresh your recollection, was it Mr. Wilson? A. I never did know his name.

Q. Do you know what this white-haired man did in the office? A. No.

Q. Did he wear glasses, do you know?

A. Yes.

Q. Now, you had gone—you say you don't know the reason why you went in there, is that correct?

A. Yes.

Q. How long were you in the office, from the time Mr. Martini came in? A. Not very long.

Q. Well, approximately?

A. I would say about five minutes.

Q. About five minutes. And it was during this five minutes that you heard him relate what you have told here? A. Yes.

(Testimony of Joanne Schwartz.)

Q. Were you late checking in that day?

Mr. Magor: Objected to on the ground it is immaterial.

Trial Examiner: Overruled.

A. No. [1385]

Q. (By Mr. Berke): Had you punched in after lunch? A. Yes.

Q. Do you recall what time it was you punched in? A. No, I don't.

Q. Where was Mrs. Storey at the time, if you know?

A. I didn't see her when I came back.

Q. And then, after five minutes or so, you left the office and went back in the cannery, is that right? A. Yes.

Q. And did you go right to your job, or did you go to Mrs. Hardin first?

A. Well, the plant hadn't started up yet, and I went, and I was talking to Mrs. — to Edna, I was kind of close to her.

Q. You say the plant hadn't started up yet?

A. No.

Q. Is that because the crew had not gone to work? A. I—no.

Q. Pardon?

A. No, it wasn't because the crew hadn't gone to work, it was something to do with the way the cannery ran.

Q. Do you know what that was?

Mr. Magor: Just a moment.

A. No. [1386]

* * * * *

(Testimony of Joanne Schwartz.)

Trial Examiner: I have a question I'd like to ask.

Do you remember what your working hours were on Saturday?

The Witness: No, I don't. [1388]

* * * * *

Trial Examiner: On the record. Did you have a motion to amend the Complaint?

Mr. Karasick: Yes, I do, Mr. Examiner. I hereby move to amend the Complaint, which is General Counsel's Exhibit 9, that physical document, by adding to Paragraph Six thereof Subparagraph 25, reading as follows: Since on or about June 1, 1955, and at all times thereafter, the Respondent required employees, prospective employees, and applicants for employment to fill out an employment application revealing their membership in or affiliation with labor organizations.

Mr. Berke: Is that your amendment?

Mr. Karasick: That is my amendment.

Mr. Berke: I object to it on the ground that the application doesn't call for any such thing, and I further object on the ground it comes too late, it is not within the scope of the Charge. I further object on the ground that both the Board and the Courts, the Ninth Circuit Court included, have held that applications containing the language which Mr. Karasick says [1396] constitutes restraint, coercion and interference, is not on its face an unfair labor practice, a statement made by Mr. Karasick at the opening of this hearing. I, therefore, object to it.

* * * * *

Trial Examiner: Yes, if you need to be. I am going to grant the motion, though. Do you still want to be heard? [1398]

* * * * *

ESTHER DOTY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [1431]

* * * * *

Q. (By Mr. Karasick): Now, you say you are a laboratory technician?

A. That's right. [1432]

* * * * *

Q. (By Mr. Karasick): Do you recall a meeting held in the plant, in the upstairs office on October 14th, 1954, at which you and a number of other people were there, Mr. Duckworth and Mr. Williams and Mr. Shuster and some others were determining which people should be retained for the one shift to go on after the next day?

Mr. Berke: Just a moment.

Mr. Karasick: Just go ahead.

Mr. Berke: Just a moment. Are you through with your question? [1469]

Mr. Karasick: Yes.

Mr. Berke: I object to the question as assuming something not in evidence. First, a meeting at which she was present and so forth, at which you were determining—

Trial Examiner: I will sustain it as to the form of the question.

(Testimony of Esther Doty.)

Mr. Karasick: Surely.

The Witness: Wait a minute. Am I supposed to answer that?

Q. (By Mr. Karasick): Were you or were you not, Mrs. Doty, at a meeting a day or two before the reduction to one shift last year, at which a discussion was had as to who should be retained for the one shift?

A. A few days—I don't know how many days before. I was—we—at that time we had the adding machine in the storeroom, it was a little quieter, and it was after—I was adding up how many boxes had been used, and the people you mentioned came in, and when I started to leave they asked me if I'd stay a little while because I had been there longer than some of them and I might know who had worked there longer; and I stayed about a half hour, and it was only a few times that they would mention someone and say, do you know if she—they were also talking about who was a good worker and who wasn't a good worker. I wasn't asked very often, but once in a while there would be someone, and they'd say, do you know how long she had been here. [1470]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): Now, going to this meeting that you say you participated in, which occurred about a few days before October 15th upstairs,—by upstairs you mean up there in the laboratory or where?

(Testimony of Esther Doty.)

A. At that time we had the adding machines in this little storeroom.

Q. Yes.

A. And that was the place. I was in there, adding, when they came in.

Q. When they what?

A. When they came in.

Q. I see. Well, did you meet there in that storeroom?

A. That's where they talked over who were the good workers.

Q. Oh, that is where they talked with you?

A. Yes. [1474]

Q. And you say you were there about how long?

A. About a half hour, possibly.

Q. Now, during the period that they talked with you, was any question asked you, or did you hear any discussion among those who were present about who was for the Union or who was against the Union? A. No, I didn't.

Q. Was there anything said about who was strong for the Union? A. No, there wasn't.

Q. Was there anything said about anyone being an agitator or troublemaker? A. No.

Q. Pardon? A. No.

* * * * *

Q. (By Mr. Berke): Do you recall on the occasion of—Strike that.

Did you know Mrs. Orice Storey?

A. Yes, I did.

(Testimony of Esther Doty.)

Q. Do you recall the occasion of her discharge, the latter [1475] part of September of last year?

A. Yes, I remember of her being discharged.

Q. Do you recall an incident a few days before that that involved her? A. Yes. [1476]

* * * * *

Q. (By Mr. Berke): Do you recall what time of day it was?

A. It was right after the whistle blew. I don't remember whether we were having our recess at that time or our noon hour at that time at—between eleven and twelve or twelve and one.

Q. Was this the—what whistle was this?

A. The whistle to go back to work, to call the women back to work.

Q. To call them back to work from what?

A. For the peeling and trimming.

Q. No, no, from what?

A. Oh, from their noon hour.

Q. From their lunch time, is that it?

A. Yes, the whistle blew that the lunch period was over. [1477]

Q. And what were you doing at the time?

A. I was going—I went down to get a sample to make a test, and I went down and got a can from the cooler, and came back up and made a test, and I found the can—the quality wasn't too good, and I went down immediately again to get another can and—

Q. All right. Now, let me ask you, what time

(Testimony of Esther Doty.)

was that, was it after lunchtime, after the whistle had blown?

A. That was after the whistle had blown.

Q. You say you went back down a second time?

A. Yes.

Q. To do what? A. To get another can.

Q. And where did you go then?

A. I went to the same place, to the cooler.

Q. And did you get it? A. Yes.

Q. And then what did you do?

A. The first time I went down to get the can, there was a group of women standing at the bottom of the stairs, gathered around the stairs, and I had to work my way through them, in and out, to get out, to get my test, and when I came back the same thing happened each time and——

Q. Go ahead.

A. Mrs. Storey was there and she said to me the first time Mr. [1478] Martini—she said tell Mr. Martini we are not on strike, and I said Mr. Martini was busy, and the next time that I made the trip she told me again, and I said, well, he is in conference. Her floor lady was standing——

Q. You told her again what? Will you relate it?

A. Oh, I'm sorry. She asked me again to tell him.

Q. Tell him what?

A. They weren't striking, they weren't on strike, although the whistle had blown, they weren't working, but she said tell him, and I said he was in con-

(Testimony of Esther Doty.)

ference, and her floor lady was right there. She could have told her.

Q. Well, just tell us what you saw and what was said.

A. I'm sorry, yes.

Q. Was there anything more that was said to you by Mrs. Storey?

A. No, only that she said that the second time.

Q. Now, where was Mr. Martini at the time, do you know?

A. He was up in this little office.

Q. In what little office?

A. The little office adjoining the lab, and he was in conference with someone.

Q. Now, can you tell me approximately how many women were there with Mrs. Storey at the time you observed them?

A. I don't know how many, but there could have been fifteen or twenty or more. It was quite crowded in this little area where I came down the stairs, and where the fork-lift was going [1479] back and forth, it was quite crowded.

Q. Was there a fork-lift going back and forth then?

A. Yes, there was a fork-lift that came in the wide door and came in and was going out.

Q. Now, about how long do you—Strike that.

As near as you can recollect, will you tell us about how long those women stood around there?

A. Probably ten or fifteen minutes.

Q. Now, was this ten or fifteen minutes after the whistle blew or—

(Testimony of Esther Doty.)

A. Yes, it was about the time it would take me to make a test.

Q. Do I understand correctly that the first time you had gone down, taken a sample, gone back up and completed your test? A. Pardon?

Mr. Berke: Do you want to give that to her?

(Question read.)

The Witness: The first time I didn't complete it entirely. There are times that you can open a can and tell that there is something wrong with it, you do part of the test and you know that you must get another can and see if it is the same, and I had done part of it and then gone down again.

Q. (By Mr. Berke): Can you estimate how long did that take you?

A. Probably seven or eight minutes, from the time I went up with the first test and then back down again. [1480]

Q. Did you finish your answer, or were you saying something else?

A. Well, I wonder if I was understood; that seven or eight minutes was the time it took between—I took the first test up before I went back down again, and then came up with the second test. It was seven or eight minutes during the first test, the first time. Then I made the second trip up and they were still standing there.

Q. I see. There was additional time beyond that seven or eight minutes? A. Yes.

Mr. Berke: I have no further questions.

(Testimony of Esther Doty.)

Redirect Examination [1481]

* * * * *

Q. (By Mr. Karasick): My question is whether or not in the recent past—and let us take since the hearing in this case opened, first, on July 19th of this year, have you discussed this incident you have testified about concerning Mrs. Storey with anyone?

A. I told Mr. Martini about it. [1487]

* * * * *

Q. I see. I take it from that, from what you said, that you volunteered this to Mr. Martini, he didn't ask you about it? A. I told him.

Q. He hadn't asked you about it before you told him? A. No.

Q. You knew that it was important?

A. No, only that I knew that we had been told continually to stay out of the way of the fork-lift, and that some of them didn't stay out of the way of the fork-lift. [1488]

* * * * *

A. No, I don't remember what our noon period was that day.

Q. Did one or more than one whistle blow that day, do you recall, at the conclusion of the noon hour? [1497] A. No, just one.

Q. One?

A. Yes. I think. You mean right at that time? No, we never have but one whistle.

Trial Examiner: What are you talking about, "that time"; do you mean that day?

The Witness: That day, that is what he means.

(Testimony of Esther Doty.)

Trial Examiner: At noon?

The Witness: Yes, we blow one whistle when we are through, when we are supposed to quit work, and there's another one blown when we are supposed to start to work. [1498]

* * * * *

Mr. Karasick: Mr. Examiner, I have asked the reporter to mark as General Counsel's Exhibit 36 for identification a document which is entitled "List of Employees' Names Read by Mr. W. H. McGuire, October 15, 1954, Who Were to be Retained for Work," which I requested from the Respondent during the course of the investigation in this case, and which the Respondent thereafter forwarded to the California Association of Employers and the California Association of Employers thereupon forwarded to our office.

Is that a correct statement? You so stipulate, Mr. Berke?

Mr. Berke: Yes, with the understanding that we do not [1511] stipulate to its accuracy, because its accuracy is very much in question, or its competency or materiality, I will join in the stipulation.

Mr. Karasick: Yes, that is agreeable and so understood. I offer the document in evidence as General Counsel's Exhibit 36.

Mr. Berke: Objection on the ground no proper foundation has been laid, and on the ground that it is incompetent and immaterial and is not accurate.

Trial Examiner Hemingway: Without regard to

the question of its accuracy, it was my understanding that you agreed to the fact that this was a document which came in the ordinary course or in due course from the Respondent to the Board.

Mr. Berke: Yes, we will agree that it was a document that they received in the ordinary course of the mail.

Trial Examiner Hemingway: I will receive the exhibit in evidence. [1512]

* * * * *

Mr. Karasick: Mr. Examiner, I have asked the reporter to mark as General Counsel's Exhibit 37 for identification a document consisting of 6 pages, mimeographed, with the caption "Women Production Employees as of October 14, 1954." It is my understanding that Counsel for the Respondent and Counsel for the General Counsel agree that all the names contained on this list, with the exception of those in which an ink check mark appears before the name, comprises employees who it is agreed between us were on the payroll of the Respondent as of October 14, 1954. Those names on this list which have such an ink check mark before them are in dispute, as far as the parties are concerned, as to whether or not they are properly to be regarded as on the payroll as of that date. The document has on it the following notations which have been made in ink, in addition to the check marks I have referred to:

The caption, the date "October 14," a change has been made in ink to show the proper date.

After the name, "Angle, Marvel," in the second

column to the right of that a notation appears of the inked letter D.

The same is true with respect to the second page, after the name "Buhrman, Nina."

The same is true with respect to the second page after the name "Chapman, Alta."

On the third page, the name "Doty, Esther," in the first [1513] column, the date "7/6/54" in the second column, and the "D" in the third column, have been inserted in ink.

On the third page, the name "Jean" has been written above the name which has been stricken out of "Eugene" following the name "Elmore."

On the fourth page, the name "Alice" has been inserted in ink after the name "McCullough."

On the same page, the name "McGuire, Mary E." in the first column, has been written in in ink, as well as the date "7/19/54" in the second column, and "N" in the third column.

On page 5, the figures "10/7/54" have been inserted in ink in the second column appearing on that page.

On page six, the name "Smith, Jessie, Mrs.," has been written in ink in the first column, the figures "7/17/54" have been so inserted in the second column, and the "N" has been so inserted in the third column, with the addition of the words "Quit end of shift 10/15."

A check mark also appears in ink before that name, being one of the employees in dispute between us.

Also with respect to General Counsel's Exhibit

37 for identification, the words and figures "July 12, 1955," appearing in the upper righthand corner of the first page, have been stricken out.

I have also asked the reporter to mark as General Counsel's Exhibit 38 for identification a 3-page mimeographed document [1514] containing the caption "Men Production Employees as of October 14, 1954." It is my understanding that Counsel for the Respondent and Counsel for the General Counsel agree that this list comprises the names of those men employed by the Respondent and on the payroll as of the date indicated, namely, October 14, 1954, as was true with the preceding document. As was true with the preceding document, the persons before whose names ink check marks appear are those who are in dispute between us as to their proper inclusion on the payroll as of that date. The following ink notations appear upon this document:

In the upper righthand corner of the first page, the words and figures "July 12, 1955," have been stricken out.

The figure "14" appears after the word "October" in the caption.

The capital letter "N" appears in the third column following the name "Alman, Lyman."

The capital letter "D" appears on the first page of the document in the third column, following the name "Burger, George."

On page one also, the name "Eugene" has been printed in over the stricken name "Jean" following the name "Elmore."

The last name appearing on that page, namely "Gullege, Alvin," together with the date "7/20/54," have been stricken out. [1515]

On the second page, the capital letter "D" has been inserted in the third column following the name "Johnson, Raymond."

The same is true with respect to the name "Jungers, Oscar."

The capital letter "N" has been inserted in the third column on page two, following the name "Narron, Henry."

The capital letter "N" has been inserted in the third column on page two, following the name "Poggi, Joseph, Jr."

The last name appearing on the page, namely, "Smith, Jessie," the date in the second column "7/17/54," and the capital letter "N" in the third column, have been stricken.

On the third page, the capital letter "D" appears in the third column following the name "Todd, Gerald."

The last notation to appear on page three has been inserted in ink in the following words and figures: "Yeager, Kenneth M.," in the first column. The figures "9/2/54" in the second column. The capital letter "D" in the third column.

The letters "N" and "D" in the third column of each of the documents so identified, General Counsel's Exhibits 37 and 38 for identification, indicate the shift which the employee in question worked, namely, whether it was a night shift or a day shift.

I herewith offer these documents in evidence as General Counsel's Exhibits 37 and 38.

Mr. Berke: No objection. [1516]

Trial Examiner Hemingway: General Counsel's Exhibits 37 and 38 are received in evidence.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 37 and 38 for identification and were received in evidence.)

Trial Examiner Hemingway: Do I understand that these insertions which you read are corrections which were made before the exhibit was agreed to be the exhibit that you offered it for?

Mr. Karasick: Yes, with the exception of the check marks. I do not know whether those are corrections or not. Those are disputed items. But with respect to all other notations that have been made upon the documents, those are corrections which have been made after consultation between Counsel for the Respondents and ourselves.

* * * * *

LEONARD JAMES DUCKWORTH

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your full name, please?

The Witness: Leonard James Duckworth.

Trial Examiner: And your home address? [1517]

The Witness: 7586 Elphick Road, Sebastopol.

Direct Examination

Q. (By Mr. Karasick): Mr. Duckworth, what

(Testimony of Leonard James Duckworth.)

is your position with Sebastopol Apple Growers Union?

A. I am the cannery superintendent.

Q. And how long have you occupied that position, Mr. Duckworth? A. Since July, 1954.

Q. Before that date did you also work for the Respondent?

A. Yes, since July 1, 1952, I was employed as chemist and as cannery foreman.

Q. Now, as superintendent of the cannery, you are in charge of the operations of the cannery itself; is that right? A. Yes, I am. [1518]

* * * * *

Q. And do you know a man by the name of Steve Struempf, Mr. Duckworth?

A. Yes, I do.

Q. And did he work for the Respondent, Sebastopol Apple Growers Union last season? [1521]

A. Yes, he did.

Q. What was the nature of his work?

A. He was the senior mechanic. [1522]

* * * * *

Q. (By Mr. Karasick): Now, Struempf instructed the other members of the mechanics' crew that you have just named as to the work they should do and when they should do it, did he not?

A. Yes, but under my direction.

Q. I am just asking you whether he did. Is that right? A. Yes.

Q. And he directed the work of the other members of the mechanics' crew whenever that was nec-

(Testimony of Leonard James Duckworth.)

essary, did he not? [1523] A. Yes.

Q. And when any of the members of the mechanics' crew wished to go home early, they received permission from him to do so; is that correct?

A. May I explain that?

Q. Yes, I will give you an opportunity later on to explain. I want you to answer now just whether or not that is true. A. Yes, that is true.

Q. And Struempf also told the other members of the crew, the mechanic and the mechanics' helpers, when they should work overtime, when it was necessary, and how long, and who should work overtime?

A. Yes, but may I also explain that?

Q. Yes, I will give you an opportunity to explain. I just want to cover these things, and I will come back to your explanation.

By the way, who checked the overtime that they turned in when they worked overtime?

A. I did myself.

Q. You were always there and did it, and Struempf never did it? A. That's right.

Q. Struempf didn't have the authority to hire or discharge anyone in his own right, did he?

A. No, he did not. [1524]

Q. But he was empowered or did recommend to you, as his superior, either the hiring or discharging of a mechanic, and his recommendation would be given more weight than the recommendation of other members of the crew; is that not true?

A. That is true, yes.

(Testimony of Leonard James Duckworth.)

Q. Now, you were Struempf's immediate superior, he reported to you? A. Yes.

Q. And I think you said before you wanted to make some explanation with regard to these things that I was asking you. Do you want to do that now?

A. Yes, I would like to.

Q. Surely.

A. Whenever any overtime was necessary, any overtime work had to be done, I personally told Struempf what I wanted done, and then I gave him the authority to take some mechanics' helpers to accomplish the task, but he didn't have the authority to act on his own at any time.

Q. He would report the matter to you and then you would give him instructions to proceed, and he would carry on from there; is that right?

A. Yes. [1525]

* * * * *

Q. Mr. Duckworth, why was Mrs. Orice Storey discharged last year?

A. On two or three occasions, she was asked by Mr. Martini not to congregate people in the plant, and she did that repeatedly, and finally on one day she punched out early and did congregate a group of the women in the plant, which we think was really a safety hazard. Our plant was rather congested at that time. There were fork lifts going in and out. And Mr. Martini asked me to find out what was going on, which I did. And I asked her to leave the plant in a nice manner, and she refused to

(Testimony of Leonard James Duckworth.)

leave. So then Mr. Martini told me to discharge her, which I did. [1527]

* * * * *

Q. And what did this hazard consist of? [1528]

A. Well, at that time our plant was rather congested. We didn't have too much operating space, and fork lifts coming in and out constantly, bringing in lids. There were men working on equipment constantly. And we had asked the women, we had made it a policy not to have them gather together in groups around the area that would be congested. And she had been asked not to do that repeatedly by Mr. Martini and by myself. And when she finally did it for the last time, Mr. Martini said that I should let her go, and that was it.

Q. What area was congested, you say around—

A. It is the cannery, the cannery floor itself.

Q. You mean any place on the cannery floor was congested? A. Yes.

Q. And Mrs. Storey had been warned about this before? A. Yes, she had.

Q. Had this happened before?

A. Yes, it had.

Q. When before had it happened?

A. I don't know the exact date, but I imagine it was three or four days before that time. The same thing had occurred, at which time Mr. Martini warned her not to do it.

Q. What had occurred then?

A. Well, just after our lunch recess, when we went back to work, she refused to go back to work.

(Testimony of Leonard James Duckworth.)

In fact, she gathered a group, I would say 15 or 20 people, around her, and demanded [1529] to talk to Mr. Martini; and Mr. Martini talked to her at that time, and then she finally went back to work. And shortly after that he called her into my office, and he and I both spoke to her at that time, in the presence of, I believe the woman's name was Layman, and asked her not to congregate people in the plant during working hours.

Q. That is what Mr. Martini told her?

A. Yes, that is correct.

Q. Were you present at the time?

A. I was present.

Q. Where did that happen?

A. In my office in the cannery.

Q. And you say she congregated 15 or 20 women about her? A. Yes, she did.

Q. Was this during working hours?

A. Yes, it was.

Q. It was not during the lunch hour?

A. It was after the lunch hour.

Q. Were the employees already at work at the time?

A. I imagine about half of them were on the machines. The machines were running. The whistle had blown. The plant was supposedly in operation.

Q. How long were these people away from work?

A. I would say 15 or 20 minutes. [1530]

* * * * *

Q. Who made the decision to discharge Mrs.

(Testimony of Leonard James Duckworth.)

Storey, Mr. Duckworth? A. Mr. Martini.

Q. And who carried out the discharge? [1531]

A. I did.

Q. When did you carry it into effect?

A. Well, one day, the day she punched out early and was again congregating women on the cannery floor, I went down and I asked the floorlady what had happened. She said that Mrs. Storey had punched out. So I went and told Mr. Martini, who was at that time in my office, that she had punched out, but that she was still congregating women against his instructions. He asked me then to go down and ask her to leave, ask Mrs. Storey to leave, which I did. And Mrs. Storey refused to leave. I went back to my office and told Mr. Martini what had happened, and he told me to fire her, which I did.

Q. And how did you accomplish that?

A. I just told her that Mr. Martini had told me to discharge her, and please leave the premises.

* * * * *

Q. Did you call out to anyone to watch out when the fork lift was going their way?

A. All the women in the plant had been warned and asked not to congregate in the congested center of the floor, and under ordinary circumstances they did not do it, just for that reason. [1541]

* * * * *

Q. Did Mrs. Storey check out on the day of her discharge before the end of the workshift she was on? A. Yes, she did.

(Testimony of Leonard James Duckworth.)

Q. Now, was that with or without permission?

A. I had two conflicting stories on that. Edna Hardin told me that she had had permission, that she had punched out because she said she was ill, and Mrs. Herrerias said she had punched out without permission. Those are the two stories I had. Which one is true I don't know. [1545]

* * * * *

Q. (By Mr. Karasick): Now, directing your attention to the lay-off at the plant of the one shift, which occurred on October 15, 1954, Mr. Duckworth, you and Charlie Williams, the night shift foreman, and floorlady Herrerias, made up the list of employees who were to be retained; is that right?

A. That is right.

Q. And the day before the lay-off occurred there was a meeting in the storeroom at the cannery, at which you people were [1550] present among others; is that not correct?

A. A meeting in the storeroom of the cannery?

Q. Or in the office.

A. No, there was no other meeting. We frequently got together. I mean the supervisors themselves got together and discussed certain personnel, which I imagine is pretty normal procedure. But there was no definite meeting.

Q. You never discussed this matter, then, with Mrs. Herrerias and Mr. Williams?

A. Not prior to the time we——

Mr. Berke: Wait just a minute. "This matter"——

(Testimony of Leonard James Duckworth.)

Trial Examiner: Do you have an objection?

Mr. Berke: I don't understand the question. May I have the question read?

(Pending question read.)

Trial Examiner: Was the question finished?

Mr. Karasick: Yes, sir. It referred to the previous matter, the matter of the lay-off.

The Witness: May I have that question again then?

Mr. Karasick: Surely.

Q. (By Mr. Karasick): You and Mrs. Herrierias and Charlie Williams together made a list of the employees to be retained; is that correct?

A. That is correct.

Q. How many times did you confer about this list before it [1551] was finally compiled?

A. Just on one afternoon.

Q. And where did you confer about it?

A. In my office.

Q. And your office is where?

A. In the cannery.

Q. Where in the cannery?

A. On the mezzanine of the cannery.

Q. Next to the laboratory?

A. Next to the laboratory, yes.

Q. And who else was present besides you three?

A. For the meeting itself, for the actual discussion?

Q. Who else was present at the time this thing was discussed?

A. Your question isn't clear. You mean just

(Testimony of Leonard James Duckworth.)

present in the office or those who took part in the discussion?

Q. Those who were present in the office.

A. Only we three, except on occasion when Bill McGuire dropped in and out and Danny Schuster dropped in and out, because at that time this office was used also as a warehouse office and they had records up there, too. And also during that meeting John Aguire brought me a list of the men he wished to retain in the warehouse.

The only discussion was that he handed me the list and said "These are the men I want to drop." That was all there was to it. He had nothing to do with the persons I selected, [1552] or Mrs. Herrierias or Charlie Williams. In fact, no one did, only we three.

Q. But he gave you the list of men he wanted to keep?

A. In the warehouse, yes, so I could take it down to the office.

Q. And who else was present at that meeting?

A. Oh, I imagine Mrs. Doty dropped in and out, because the office and the laboratory are adjoining and the door was open, but she did not participate.

Q. You imagine she dropped in and out, did you say?

A. I know she must have come in and out. She was asking me on the quality of the product continually.

(Testimony of Leonard James Duckworth.)

Q. Do you have any present recollection of her being there?

A. She was in the office on occasion.

Q. Did anyone ask you any questions about this list or any of the employees? A. No.

Q. Was Mrs. McGuire there, Mary McGuire?

A. I don't know whether she was or not. Frankly, I don't know. She was not present at the meeting, I know that. She might have been in the laboratory. I would have to check the records to say. I don't know.

Q. Now, consideration was given to length of service among other things, in choosing this list, was it not?

A. Consideration was given primarily on merit.

Q. My question, Mr. Duckworth, to you was whether or not it was true that consideration was given, among other things, to length of service.

A. Yes.

Q. Now, Mrs. Herrerias wrote down the names of the people as they were chosen for retention: is that right? A. Yes, she did.

Q. And then you finished up with the list by the time you got through? A. Yes.

Q. How long did the meeting last?

A. About an hour.

Q. And after it was over, what did Mrs. Herrerias do with this list?

A. She took the list down and gave it to Bill McGuire.

Q. Who did? A. Mrs. Herrerias.

(Testimony of Leonard James Duckworth.)

Q. And what did he do with it?

A. I don't know. It was out of my hands then.

Q. This list was the list of names, I think you said, of people who were to remain at work?

A. Yes.

Q. The following day there was a meeting in the warehouse at which the employees were informed of the reduction of one shift; is that right? [1554]

A. The following day or the day after, I don't know. It was on a Friday.

Q. What is your recollection now?

A. I believe that we made that list out on a Wednesday and the meeting we had in the warehouse was on Friday.

Q. Are you certain of that?

A. I am not absolutely certain of the day we made the list. I am certain of the time we had the meeting.

Q. Now, you are certain of the time of the meeting in the warehouse? A. Yes.

Q. That was a Friday, was it? A. Yes.

Q. At that meeting Mr. McGuire read the list of names of employees who were to remain at work; is that right? A. Yes.

Q. And that was the list that had been made up following consultation between you and Mr. Aguire and Mrs. Herrerias in the fashion that you had—— A. Not Mr. Aguire

Q. Between you and Charlie Williams, excuse me. Is that right? A. Yes.

(Testimony of Leonard James Duckworth.)

Q. Now, Mr. Duckworth, what was the reason for the discharge of Elsie Dickerson? [1555]

A. Elsie Dickerson actually sabotaged our product. For that reason she was discharged. [1556]

* * * * *

Q. Now, what was it that she had done?

A. In our normal procedure, an apple is placed in the machine, in which the peeling is removed and the core is removed, and subsequent to that the apples are hand trimmed in case any bruised tissue remains or pieces of the core, or other matter which you don't want to go into the product. And Mrs. Dickerson picked up the apples—and there were several of them—and took her trimming knife and cut a hole in the side of the apple and inserted a core into that hole.

Q. Now, as I recall, you say she did that to several apples? A. Yes, she did.

Q. In other words, she did what you call plugged an apple by putting a core in it; is that right? A. That is right.

Q. That would be an apt description?

A. That would be, yes.

Q. Now, the decision to discharge Mrs. Dickerson was made by whom? A. By me.

Q. By you? A. Yes.

Q. And when did you make the decision?

A. After she had been warned not to plug those apples. And [1557] when it happened again, I discharged her.

Q. How many apples did she plug all together?

(Testimony of Leonard James Duckworth.)

A. I saw about a dozen. How many more had been plugged and had gone by the inspectors, I don't know. [1558]

* * * * *

Mr. Karasick: Mr. Examiner, I have asked the reporter to mark as General Counsel's Exhibit 40 A through G, inclusive, a letter on the letterhead of the California Association of Employers, dated October 29, 1954, addressed to Mr. L. D. [1592] Mathews, Jr., and signed by C. B. Rose, Executive Secretary, together with attachments running from General Counsel's Exhibits Nos. 40C through 40G, inclusive.

I have also asked the reporter to mark as General Counsel's Exhibit 41A through 41H, inclusive, for identification, a series of documents consisting of General Counsel's 41A for identification, being a letter from C. B. Rose, Executive Secretary of California Association of Employers, dated November 16, 1954, to Mr. L. D. Mathews, Jr.; as General Counsel's 41B for identification, a letter bearing the same date, signed by the same individual, addressed to the same person; as General Counsel's Exhibit 41C for identification, a letter over the signature of Elmo Martini, on the letterhead of Sebastopol Apple Growers Union, dated November 15, 1954, addressed to Mr. C. B. Rose, Executive Secretary of California Association of Employers, together with attachments marked General Counsel's Exhibits 41E through 41H, inclusive.

Trial Examiner: Excuse me. I missed one there,

I think. C was the letter from Elmo Martini, was it?

Mr. Karasick: Yes, it was C and D, I am sorry, and beginning with attachments at E, running through H.

I have also asked the reporter to mark as General Counsel's Exhibit 42A through 42F documents consisting of the following: a letter over the signature of W. H. McGuire, written on the letterhead of Sebastopol Apple Growers Union, dated February 17, [1593] 1955, addressed to Mr. W. M. Caldwell, President, California Association of Employers, which is General Counsel's 42A for identification, together with attachments beginning at General Counsel's 42B and running through 42F, inclusive.

I have also asked the reporter to mark as General Counsel's Exhibit 43A through E, inclusive, a list containing the names of individuals in the first column, the second column entitled "Date Hired," the third column entitled "Job," the fourth column entitled "Last Shift," the fifth column entitled "Date of Termination," the sixth column entitled "Reason," and the last column entitled "Employed 10-18-54 question mark." All of the ink notations on this document, with the exception of the word "date" over the word "hired" in the second column and "date of" over the word "termination" in the fifth column, being notations in the handwriting, script or print of William McGuire, the sales manager of the Respondent.

I herewith offer these documents in evidence, and with express attention directed, Mr. Examiner, to General Counsel's Exhibits 40C, 40D, 40E and 40F,

there are on 40C and 40D certain pencil marks to the left of the document in the margin, and on 40E and 40F certain notations in ink and in red pencil which appear on the document. I am offering none of those notations, but only the typewritten matter which appears on each of those documents. [1594]

I herewith offer these documents in evidence.

Trial Examiner: Any objection?

Mr. Berke: I think so the record is clear with respect to 41, the letter from Martini of November 15, 1954, which was stated to be over his signature, the record ought to show it is over his name, not his signature.

Mr. Karasick: That is agreeable. There is no question, though, that the letter is what it purports to be, namely, a communication from the Respondent with the signature of Mr. Martini being written in by someone presumptively authorized to sign for him; isn't that correct, Mr. Berke?

Mr. Berke: I don't know. I will stipulate that it is over his name, not his signature.

Trial Examiner: Do you know whose initials those are?

Mr. Berke: No, I don't. Mr. Martini looked at them and tried to figure out the initials and couldn't.

Trial Examiner: It seems to have been dictated by "Mc".

Mr. Karasick: Is there any question about this, that this document was one which was sent by the Respondent and with Mr. Martini's authorization?

Mr. Berke: I will stipulate that it was sent to the person whose name appears on it, Mr. C. B.

Rose, Executive Secretary, California Association of Employers, and it is obviously Respondent's letter.

May we go off the record just a moment? [1595]

Trial Examiner: Off the record.

(Off the record.)

Trial Examiner: On the record.

Mr. Karasick: It is my understanding, Mr. Examiner, that after conferring with Counsel for the Respondent that it may be agreed that the signature or the name of Elmo Martini appearing on General Counsel's Exhibit 41D was signed for Mr. Martini with his authorization.

Mr. Berke: Yes. I object to them on the ground that no proper foundation has been laid for the receipt. There is no evidence here to show their accuracy. They are not established to be competent, and they are irrelevant and immaterial. There are records which show the actual facts here. General Counsel's representative has them. And we have agreed that we would bring Mr. Wilson in to testify to the facts, if that is still desired. All it does is just to add and make this record, already prolix, unduly more so, and does not add anything, just creates a lot of additional confusion.

Mr. Karasick: May I state our position in that regard?

Trial Examiner: Just enlighten me on this 43, if you will. Was that stipulated to have been prepared by the Respondent?

Mr. Karasick: That is the one I made the statement with respect to the notations by Mr. McGuire.

I may say that the typewritten names and the numbers which appear on that list were prepared by the Board office from information previously [1596] submitted by the Respondent. They were then given to the Respondent and asked to check for the information that appears on the list. That was done by Mr. McGuire in his own writing on or about March 17, 1955.

Did you want to say something in regard to that before—

Mr. Berke: May I ask a question?

Mr. Karasick: Yes.

Mr. Berke: Do you claim that all of the writing in these columns here are in McGuire's handwriting?

Mr. Karasick: Yes, with the exception that I made, with the two explanations that I made as to "date" and "date of" which appear at the heading of two of the columns.

It is my understanding that Counsel for the Respondent has agreed that the signatures of C. B. Rose wherever they appear, and also the signature in one of these documents of W. H. McGuire, are authentic. Is that not correct, Counsel?

Mr. Berke: Yes.

Mr. Karasick: Now, with respect to General Counsel's 43A through E, inclusive, I offer this document, subject to the right of Respondent's Counsel to check the accuracy of my statement that the handwritten portions, with the exception of the things noted, have been put in there by Mr. McGuire.

Trial Examiner: Let's see if I understand that. Do you mean that——

Mr. Karasick: That this is his handwriting.

Trial Examiner: Mr. Berke is agreeing that they appear to be in Mr. McGuire's handwriting?

Mr. Berke: No, I don't agree to that. I have inquired of two gentlemen who I thought might know. They tell me they are not familiar with his handwriting. So I don't know if it is in his handwriting or not. I wouldn't stipulate that they even appear to be. I am willing to check, if Mr. Karasick wants to withhold offering it. I will check and let him know in the morning.

Mr. Karasick: It is agreed, is it not, that this document was furnished by the Respondent? There is no doubt in either Mr. Caldwell's or Mr. Martini's mind about that, is there?

Mr. Berke: Mr. Caldwell asked me a question, didn't you prepare it right there?

Mr. Karasick: If you want to go through all this on the record, fine.

Mr. Berke: Why don't you hold it up until morning? I can check and ask if it is in McGuire's handwriting, and if it is, I will agree that it is in his handwriting. Of course, that does not, as I understand it, waive my basic objection to this, which I have made to the other documents.

Trial Examiner: I take it that these are lists of employees which would tend to show who was in the employment of the Respondent on October 14?

Mr. Karasick: That is right.

Mr. Berke: I don't agree to that.

Mr. Karasick: These lists were furnished to us at various times at our request, Mr. Examiner, and collectively form the basis for the conclusion by the General Counsel that the persons whose names have been checked on General Counsel's Exhibits 37 and 38 were persons who were employed on the payroll as of October 14, 1954. Now, if the Respondent now contends, as it apparently does, that this information or some of it is erroneous in any respect, it is perfectly free to produce such evidence as it can to show that. [1599]

* * * * *

LEONARD JAMES DUCKWORTH

resumed the stand and testified further as follows:

Cross Examination [1602]

* * * * *

Q. (By Mr. Berke): Now, you made some reference as to the basis on which people were selected for retention for the single shift. What [1603] was that basis?

A. I would say primarily on merit.

Q. Was any consideration given to length of service? A. Yes, it was.

* * * * *

Q. Now, with reference to Mrs. Dickerson, there was a reference here to her discharge because she plugged an apple, which could have affected or destroyed the quality of the product, as you put it. Was that the sole reason for her discharge?

A. That was the sole reason for her discharge, yes.

Mr. Karasick: May I have the question, please?

(Testimony of Leonard James Duckworth.)

(Last question read.)

Q. (By Mr. Berke): And now, was it just because she did this to one apple?

A. No, because she did it to several apples.

Q. Was she discharged for Union activity?

A. No. [1604]

Q. Were you asked to find an excuse to discharge her? A. No, I was not.

Q. Who is your immediate superior, or was last year? A. Mr. Martini.

Q. Did Mr. Martini ask you to find an excuse to discharge her? A. No.

Mr. Berke: I have no further questions.

Redirect Examination

Q. (By Mr. Karasick): When you spoke to me in Mr. Caldwell's presence at my office, Mr. Duckworth, I asked you a number of questions about this case, did I not? A. Yes, you did.

Q. And I took notes on that, did I not?

A. Yes.

Q. And then I told you that I would reduce those notes to the form of an affidavit and send it to you to look over and be sure it was correct and accurate, and that you should feel free to make any changes you saw fit; is that right? A. Yes.

Q. And subsequently you received a typewritten copy of an affidavit in the mail from me, did you not? A. Yes.

Q. Then pursuant to our conversation you felt free to make what changes were necessary in that

(Testimony of Leonard James Duckworth.)

affidavit to make it as [1605] accurate as you could; is that right? A. Yes.

Q. And the affidavit which you subsequently submitted on March 18, I believe it was, was the result of that effort; is that right? A. Yes.

Q. And this was done, to the best of your ability, to give us the facts as you knew them; is that right? A. Yes.

Q. There was nothing in the affidavit I submitted to you, or that you subsequently submitted, that you had not told me, was there? A. No.

* * * * * [1606]

Q. (By Trial Examiner): Referring to the day of Mrs. Storey's discharge, as I [1612] understood it, you did not see her punch out and you didn't know that she had punched out?

A. I didn't see her punch out, no, but I knew she was not working, because I saw her standing down at the bottom of the stairway.

Q. Was that by the time clock?

A. Close to the time clock, yes.

Q. Was she the only one you saw there?

A. No, she had a small group around her.

Q. Do you know who those women were who were around her? A. No.

Mr. Berke: Do you mean by name?

Trial Examiner: Either by name or by shift.

The Witness: No, I don't.

Q. (By Trial Examiner): And was she still in the same place when you first spoke to her?

A. Yes, she was.

(Testimony of Leonard James Duckworth.)

Q. Do you remember exactly what you said to her?

A. First of all, I went and saw the floorlady and asked what Mrs. Storey was doing there. She said she had punched out. Then I went to see Mr. Martini, who was up in the office at the time, and he told me to have her leave the premises. So I went downstairs and asked her to leave. And she refused. So I went back upstairs again and told Mr. Martini, and he told me to discharge her, so I did. [1613]

Q. You didn't inquire of the floorlady, then, as to whether or not any of the other women standing there had punched out? A. No, I didn't.

Q. Was there any reason why you limited your question to Mrs. Storey?

A. Because the ones coming in were not the ones on the shift. They worked on the night shift, the ones we were talking about.

Q. I just asked you if you knew they were on the night or the day shift?

A. Not by name, no. They were night shift people.

Q. And was the floorlady that you spoke to Mrs. Hardin?

A. Yes, she was. In fact, I spoke to both of them, Mrs. Hardin and Mrs. Herrerias.

Q. Which one did you speak to first?

A. Mrs. Hardin first.

Q. Where was Mrs. Herrerias when you spoke to her?

(Testimony of Leonard James Duckworth.)

A. I don't remember exactly. Somewhere in the cannery.

Q. You have no more specific recollection of it than that?

A. No. Down by the time clocks, I imagine. That is the logical place it would be.

Q. Right near where Mrs. Storey was?

A. Yes, near there.

Q. Do you know whether or not that was the same time clock that Mrs. Storey used? [1614]

A. I don't know.

Q. Was there any reason why you didn't look at Mrs. Storey's time card instead of asking the floorlady?

A. Usually we leave most of the women's supervision up to the floorlady. We don't interfere too much.

Q. You mean you never look at the time cards?

A. No.

Q. Now, reference was made here to some statement you made about Mrs. Storey's having annoyed certain employees. Were these employees that were standing around the time clock the ones you had reference to? A. Yes.

Q. How do you know that she annoyed them?

A. Because one in particular came upstairs—came upstairs to tell me about it.

Q. Who was that? A. Mrs. Chicano.

Q. Was she on the night shift?

A. Yes, she was.

Q. Were there any more that you knew by name?

(Testimony of Leonard James Duckworth.)

A. No.

Q. Do you remember what Mrs. Chicano said?

A. She said just that Mrs. Storey was bothering her all the time about joining the Union, and she didn't want to join, didn't want any part of it.

Q. Was that when you went down and spoke to Mrs. Storey the first time?

A. That was before I spoke to Mrs. Storey.

Q. You mean as a result of that conversation with Mrs. Chicano, did you then go down and speak to Mrs. Storey?

A. No, I didn't speak to Mrs. Storey until I talked to Mr. Martini.

Q. Well, you were upstairs when Mrs. Chicano spoke to you? A. Yes, I was.

Q. Did you speak to Mr. Martini before you went downstairs, or did you go downstairs first?

A. I spoke to Mr. Martini before I went downstairs.

Q. Then as I understand it, you went down and told Mrs. Storey to leave, and she——

A. She refused to leave.

Q. Just what were her words?

A. She just said, "I'm not bothering anybody."

Q. Is that all? A. Yes.

Q. What did you do then?

A. I went back to Mr. Martini.

Q. What did you tell him then?

A. I told him then that I had asked her to leave, and she said she wasn't bothering anybody. He said, "Well, go down and discharge her, then."

(Testimony of Leonard James Duckworth.)

Q. So then you went down there again?

A. Yes.

Q. Where was she at the time you got down to her that time? A. Right by the time clock.

Q. In the same place?

A. The same place, yes.

Trial Examiner: Are there any other questions?

Mr. Karasick: Yes.

Q. (By Mr. Karasick): When you spoke to Mr. Martini the first time, before you went down to see Mrs. Storey at all, do you recall what your conversation was?

A. No, I couldn't exactly tell you the conversation. I just told him that Mrs. Storey was down there bothering people. First he wanted to know what she was doing there.

Q. Did you tell him your conversation with Mrs. Chicano? A. Yes, I did.

Q. And then he told you to go down and tell Mrs. Storey to leave? A. To leave, yes.

Q. That is what you told Mrs. Storey?

A. Yes, I did.

Q. And she said she wasn't bothering anyone?

A. That is right.

Q. And you went up and told Mr. Martini what she said. A. Yes. [1617]

Q. Then what did he say?

A. Then he told me to discharge her.

Q. Now, when you went down the second time to talk to Mrs. Storey, what was your conversation with her on that occasion?

(Testimony of Leonard James Duckworth.)

A. On the second time, that is, when I asked her to leave. I went down the first time to see what she was doing. The second time I went down, I asked her to leave, and she told me she wasn't bothering anybody. The third time I went down, I asked her to—I discharged her.

Q. What did you tell her on the third occasion?

A. I just told her that Mr. Martini had said to discharge her.

Q. Did you tell her why?

A. No, I didn't.

Q. Did she ask? A. No, she just left.

* * * * * [1618]

Trial Examiner: Is Mrs. Doty a year-round, too?

The Witness: No, she isn't. [1623]

* * * * *

Trial Examiner: I still want to get this Mrs. Storey incident straightened out.

Q. (By Trial Examiner): When I was questioning you, I got the understanding that you went downstairs only twice, and then it turns out that you were downstairs three times. Now, suppose we take it step by step here and let me get this straight. Before Mrs. Chicano came and spoke with you, did you know that Mrs. Storey was downstairs?

A. Yes, I did.

Q. How did you know that? A. I saw her.

Q. Could you see her without leaving the office?

A. Yes.

Q. You were in the office when you saw her?

(Testimony of Leonard James Duckworth.)

A. Yes, but I was up in the balcony. I often just walked around the balcony there to observe the operation of the cannery. In fact, that is where I saw her.

Q. As I understood it, you told Mr. Karasick that you went downstairs to see what Mrs. Storey was doing.

A. Yes, that is right, I did.

Q. Was it necessary to go downstairs?

A. I wanted to find out why she wasn't working.

Q. Was that before Mrs. Chicano spoke to you?

A. I don't know whether it was before or after. I really [1626] don't.

Q. Well, the first time you went down, then, what did you do?

A. I went down to see Mrs. Hardin, and see why Mrs. Storey wasn't working.

Q. Then what did you do?

A. Then I went back upstairs, and Mr. Martini was in the cannery office at that time, and I told him that she was down there and knocked off. And that is when he asked me to ask her to leave. And I went down the second time and asked her to leave, and she said she wasn't bothering anybody. And she refused.

Then I went back upstairs and told Mr. Martini, and he told me to discharge her. So I went downstairs the third time and discharged her.

Q. On which occasion, if any of those, did you talk with Mrs. Herrerias?

A. I didn't talk to Mrs. Herrerias any time during those occasions.

(Testimony of Leonard James Duckworth.)

Q. Was it after the discharge that you talked to her? A. Yes, it was.

Q. How long after?

A. Well, I imagine five or ten minutes.

Q. Do you remember just how you asked her?

A. I asked her, I don't know the exact words, but I just asked [1627] her if she had punched out with or without permission, and she told me she thought that she had punched out without permission. Right after that time, they were changing shifts, and that is why Mrs. Herrerias was there, part of the day shift.

Q. The day shift was still on duty when you asked Mrs. Herrerias that question? A. Yes.

Q. When Mrs. Herrerias works on the day shift, does she work as a floorlady? A. Yes.

Q. Does she work over Mrs. Hardin? That is to say, did she work over Mrs. Hardin, or was Mrs. Hardin floorlady over the girls, just the same?

A. Mrs. Hardin was quite ill at that time, so to relieve her of doing so much walking on the floor, we put her in the office upstairs and let her work up there, when Mrs. Herrerias came on the day shift. In other words, she was no longer floorlady. Mrs. Herrerias——

Q. This Storey incident occurred before the lay-off, didn't it? A. Yes.

Q. So at that time Mrs. Herrerias was not floorlady of the day shift?

A. Not of the day shift, no. [1628]

(Testimony of Leonard James Duckworth.)

Q. Well, is your testimony the same, then, that Mrs. Hardin was not——

A. At that time, Mrs. Hardin was the floorlady on the day shift.

Q. Now, do you mean to say that as soon as Mrs. Herrerias came in at 11:30 or a quarter of 12:00, that she went in and relieved Mrs. Hardin?

A. No, she didn't.

Q. That is what I am trying to find out. What position did Mrs. Herrerias hold, if she worked on the day shift, while Mrs. Hardin was still there?

A. She didn't work on the day shift while Mrs. Hardin was still there.

Q. She didn't work at all, then, until after the night shift started?

A. That is right, yes.

Q. Then if you asked Mrs. Herrerias about Mrs. Storey ten minutes after you had discharged Mrs. Storey, that would mean that Mrs. Herrerias was not working?

A. She wasn't working at the time, no. The night shift hadn't started yet.

Q. And Mrs. Herrerias, then, would not be likely, would she, to know anything about whether Mrs. Storey had punched out or not ?

Mr. Berke: I object to that as speculative, Mr. Trial [1629] Examiner. After all, he is telling us what he asked her and what she told him.

Trial Examiner: I will withdraw the question.

Q. (By Trial Examiner): Was there some rea-

(Testimony of Leonard James Duckworth.)

son why you preferred to ask Mrs. Herrerias, then, rather than Mrs. Hardin?

A. Yes, there was, because Mrs. Herrerias had been with us longer, and in fact Mrs. Hardin's first year. Mrs. Herrerias had been with us about three years, and frankly she was a bit more efficient.

Q. And what was the reason why you thought Mrs. Herrerias would be in a position to know about whether a worker on the day shift had punched out at 11:30?

A. Because she and Mrs. Hardin very frequently would discuss things, talk them over amongst themselves. [1630]

* * * * *

Mr. Karasick: Mr. Examiner, you recall that yesterday there was some discussion as to General Counsel's Exhibit 43-A through E, inclusive, concerning whether or not notations which appear in ink on that document were in the hand of William H. McGuire, sales manager of the Respondent. With the exceptions of the word "date" before the word "hired" in column two, and the words "date of" before the word "termination" at the head of column five, Counsel for the Respondent has checked the document and agrees with me that the notations made thereon were made by William H. McGuire in the preparation [1638] of this document.

Is that a correct statement?

Mr. Berke: Yes. However, of course, I do not stipulate that it is accurate. In fact, we will show

that it is inaccurate, and I objected to its receipt on that ground.

Mr. Karasick: I am offering it in evidence.

Mr. Berke: I object to its receipt on the grounds that it is incompetent, irrelevant and immaterial, no proper foundation has been laid for it. Moreover, it is inaccurate, doesn't reflect the true facts which are reflected by the payroll records heretofore offered by Counsel for the General Counsel, which he has had in his possession, which shows the true situation.

Trial Examiner: You stated yesterday, Mr. Karasick, that you received this document from the Respondent?

Mr. Karasick: Yes, that is correct. Just one matter in regard to the statement that the payroll records are in my possession. They have been in Mr. Berke's possession. I have had access to them here in the hearing room only, which was the understanding. I want the record clear on that.

Trial Examiner: I will now receive General Counsel's Exhibit 43, including sub pars A to E.

(Thereupon the documents above referred to, heretofore marked General Counsel's Exhibit No. 43-A through 43E, inclusive, were received in evidence.) [1639]

* * * * *

ANGELO H. BERTOLUCCI

was called as a witness by and on behalf of the General Counsel, and being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Karasick): Mr. Bertolucci, are you associated with the Teamsters Local 980, the Charging Party in this case? A. I am.

Q. What is your position?

A. I am the president and business representative of the Local 980.

Q. And how long have you held that position?

A. Going on seven years.

Q. Continuously for the past seven years?

A. Yes; not quite seven, but it is going on seven.

Q. For the past six full years? [1692]

A. That is right.

Q. I direct your attention to the organizing campaign of the union, the Sebastopol Apple Growers Union, that occurred last year.

Q. Do you recall a meeting with Mr. Elmo Martini, representing the respondent, Mr. Roy Rhodes, and yourself, representing the Union, shortly before the organizing, or about the time the organizing efforts occurred out there? A. I do.

Q. When was that meeting?

A. Around the 28th or 29th of July.

Q. Where did it occur?

A. In the SAGU office, main office.

Q. Who were the persons present?

A. Mr. Rhodes, Mr. Martini and myself.

(Testimony of Angelo H. Bertolucci.)

Q. And will you tell us as well as you can recall what was said and who said it at that meeting?

A. Well, we went into the office and the girl—

Q. By “we” you mean?

A. Rhodes and myself. The girl said, “Well, Martini is busy, will you wait a few minutes?” We said, “Yes.” So we waited there for a while. After that Martini came over and in plain English said, “What the hell are you guys doing here? You better get out and come back in a couple years.”

Q. And had either you or Mr. Rhodes said anything? [1693]

A. Not then, but afterwards there was discussion between him and Rhodes.

Q. Will you tell us as well as you recall what was said and who said it?

A. Well, Rhodes, in the conversation with Martini, told him that he was there—he knew what he was there for and he would like to have a chance to talk to the people, would he mind if he talked to the people, and Elmo said, “No, but not on company time.”

Q. Anything else said?

A. Then we left, went up to the corner grocery.

Q. What else was said?

A. Then Rhodes asked Martini if he wouldn't do one thing for him. He said, “Being that you are having a board meeting tonight, I would like for you to bring it before your board and see what they think about it.” So Elmo said, promised he would

(Testimony of Angelo H. Bertolucci.)

bring it up before the board, and then would let Rhodes know by phone the next morning.

Q. As far as you know, did he call Rhodes the next morning? A. No, he did not. [1694]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Berke): Was that your understanding that you could not lay anyone off before a Labor Board election no matter what the reason may have been for the layoff?

Mr. Karasiek: Object to that as immaterial and irrelevant.

Trial Examiner: That has already been answered.

Mr. Berke: No; I don't think so.

Trial Examiner: You may answer then.

The Witness: Yes. [1704]

* * * * *

Q. (By Mr. Berke): How many years have you known Mr. Martini?

A. Quite a number of years.

Q. You were friendly with him, were you not?

A. Yes.

Q. And you talked to him on many occasions before July 28th or 29th, had you not?

A. That is right.

Q. And on this particular occasion, when you said something about, "What the hell you guys doing here," was he angry?

Mr. Karasiek: Object.

Trial Examiner: Overruled.

(Testimony of Angelo H. Bertolucci.)

The Witness: Well, I don't know whether he was angry or not. He answered that in that tone of voice, "What the hell are you guys doing here." He knew right away what we were there for.

Mr. Berke: I move that last portion be stricken, "he knew right away."

Trial Examiner: Strike it.

Q. (By Mr. Berke): You had talked with Elmo Martini many times before, as I understand it, had you not? A. Yes; lots of times before.

Q. Yes.

A. But not only on organization of the plant.

Q. On other matters?

A. Yes; friendly chats. [1705]

Q. And you heard Elmo Martini use a cuss word on those occasions too, had you not?

A. Well, I don't know. I don't remember that.

Q. He didn't order you out of his office, did he?

A. Well, we were there just a few seconds after he had said that. We went outside.

Q. With him?

A. Yes; and we went up to the grocery store.

Q. When you say, "We went up to the grocery store," was he with you and Mr. Rhodes?

A. Mr. Rhodes, myself and Martini.

Q. And you drove over in somebody's car, did you? A. Yes.

Q. Whose car? A. His station wagon.

Q. Whose station wagon?

A. Martini's station wagon.

(Testimony of Angelo H. Bertolucci.)

Q. And you had a friendly conversation in the station wagon, did you not, when you drove?

Mr. Karasick: Object to the characterization of whether it was friendly or not friendly. It is a matter of interpretation and the ultimate conclusion for the trier or the finder of facts.

Trial Examiner: Well, on a matter of that kind, I will permit it. You may answer. [1706]

The Witness: There was no conversation between the office and the grocery store.

Q. (By Mr. Berke): Complete silence?

A. Well, we just got there in a jiffy and that was it.

Q. Was it complete silence during that jiffy?

A. I believe there was, yes; not any talk.

Q. And where did you go, in the grocery store?

A. A little store.

Q. At Molino Corners? A. That is right.

Q. And did Mr. Martini go in with you?

A. That is right.

Q. What took place in there?

A. We each got a soda and went outside.

Q. And when you left Mr. Martini, did you leave with angry words?

Mr. Karasick: Object.

Trial Examiner: Overruled.

The Witness: Do you want me to answer?

Trial Examiner: Yes.

Mr. Berke: I asked you the question, yes.

The Witness: What is the question now?

(Question read.)

(Testimony of Angelo H. Bertolucci.)

The Witness: No, we did not.

Q. (By Mr. Berke): As far as you were concerned, everything [1707] was friendly.

Mr. Karasick: Object to this witness, as far as he was concerned, whether it was friendly or not.

Trial Examiner: Overruled.

Mr. Karasick: As being immaterial and irrelevant.

Trial Examiner: Overruled.

The Witness: The answer was that Mr. Rhodes asked him to bring the thing before the board that night. He was having a board meeting and he would let him know next morning by phone, and we left.

Q. (By Mr. Berke): As far as you were concerned, when you left it was all very friendly?

Mr. Karasick: Object.

Trial Examiner: Overruled.

The Witness: Do you want me to answer?

Trial Examiner: Can you answer it?

The Witness: I think it was. We didn't come to blows.

Q. (By Mr. Berke): When you went in with Mr. Rhodes to talk to Mr. Martini on that day, you went in there to ask him if Mr. Martini would mind if you talked to the people that worked there, was that it?

A. Yes; during the conversation of those few minutes Rhodes asked him if it would be all right to talk to the people.

Q. But you wanted to go among the people to organize them that were working at SAGU? [1708]

(Testimony of Angelo H. Bertolucci.)

A. Yes; but he said not on company time.

Q. Please answer my question. If you didn't hear it I will ask the reporter to repeat it. You wanted permission from Mr. Martini to go among the people working at SAGU to talk to them about organizing them; is that right?

A. Well, the only thing to that, Rhodes asked Martini if he had any objection to talking to the people.

Q. Will you please answer my question? Would you repeat it to him?

(Question read.)

Mr. Karasick: I object; I submit the question has been asked and answered.

Trial Examiner: I will ask the witness to answer that as directly as possible.

The Witness: Still I say that Rhodes asked Elmo if he had any objection to talking to the people, and he said, "Not on company time," and then we took off. [1709]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Karasick): Mr. Bertolucci, after you had talked to Martini that day, did you go out to the plant for the purpose of talking to employees and asking them to join the union? [1711]

Trial Examiner: Within a period of a month or so.

Q. (By Mr. Karasick): I will develop that

(Testimony of Angelo H. Bertolucci.)

when I get this general question answered.

A. Yes, I went out there. In fact, the first time I went out there, myself and two girls and another gentleman with me, we went out to the front door of the cannery and as we distributed the literature, why, after about ten minutes we were there, we were thrown out.

Q. Who threw you out?

A. He came over to me and said——

Trial Examiner: Just answer the question. Who was it?

The Witness: His name is Charles, Charlie. I don't know what his last name is—Williams.

Q. (By Mr. Karasick): And what did Charley Williams say to you on that occasion?

A. He came to me and said, "Listen, you know you are on company property and the company doesn't allow this. You better get back on the highway." So I thanked him and we all went back on the highway.

Q. Were there any other occasions after that that any representative of the company told you that or anything similar about organizing on company property?

A. We never did go on the company property from then on. [1712]

* * * * *

WILLIAM GRAMI

was called as a witness by and on behalf of the General Counsel, and being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your name, please?

The Witness: William Grami.

Trial Examiner: And your address?

The Witness: 2209 Sonoma Avenue, Santa Rosa, California.

Direct Examination

Q. (By Mr. Karasick): Mr. Grami, are you a representative of the union which is the Charging Party in this case?

A. Yes; I am. [1714]

Q. What is your position?

A. I am an organizer for the Western Conference of Teamsters.

Q. What is the connection of the Western Conference of Teamsters with Local 980?

A. The Western Conference of Teamsters is a federation of the various local unions in the 11 western states.

Q. And were you sent to help the local here in its organizing efforts?

A. That is right.

Q. When did you come here to Santa Rosa?

A. It was on or about the 15th of August of 1954.

Q. Were you here at the time that the union first distributed buttons to the employees at the plant?

A. Yes.

Q. I hand you General Counsel's Exhibit 31 and

(Testimony of William Grami.)

ask you to look at that carefully, and when you have had sufficient time, indicate so. A. Yes.

Q. Is that the button to which you refer?

A. Yes.

Q. By that button I mean is that the type of button which was distributed at the time?

A. Yes; that is it.

Q. When were these buttons handed out to the employees at SAGU, do you recall? [1715]

A. They were handed out on two occasions. The first was the 13th of October at a union meeting, 1954.

Q. And there were employees working on both the day and night shift at the plant at that time, were there not? A. That is right.

Q. Was the button handed out to one or both of the employees on the shift?

A. One shift on the 13th.

Q. Which shift was that?

A. The day shift.

Q. And why was that?

A. Well, the reason was that we had a meeting in the afternoon for the night shift and one in the evening for the day shift because of the fact that the representation at the night shift meeting wasn't as great as we had desired and we chose not to hand out the night shift buttons, but to hand them to the day shift first and follow the succeeding day with nights.

Mr. Berke: I move all that be stricken as irrele-

(Testimony of William Grami.)

vant and immaterial, not binding on the respondent, has no bearing on the issues here.

Trial Examiner: Motion denied.

Q. (By Mr. Karasick): Were buttons handed out to the night shift? A. Yes.

Q. When? [1716]

A. The 14th of October, as they came on shift.

* * * * *

Q. Were there various employees at the SAGU who were made members of the union committee?

A. Yes.

Q. Was there one committee or more than one committee?

A. There were two committees, a day and a night.

Q. Did you have a list of the members of the committee at the SAGU plant during last year's season prepared? A. Yes.

Q. Both for the day and night shift? [1717]

A. That is right.

Q. I hand you a document which I ask the reporter to mark as General Counsel's Exhibit 44-A to 44-C inclusive, consisting of three typewritten pages, and ask if that is a list of the day committee members, to which you have referred?

A. Yes.

Q. I hand you a typewritten document consisting of two pages, which I ask the court reporter to mark as General Counsel's Exhibit 45-A and 45-B, and ask you if that is a list of the night committee members to which you have referred?

(Testimony of William Grami.)

A. Yes.

(Thereupon the documents above referred to were marked General Counsel's Exhibits 44-A to 44-C, and 45-A and 45-B, for identification.)

Mr. Karasick: I offer the documents in evidence as General Counsel's Exhibits 44-A to C, inclusive, and 45-A and B. [1718]

* * * * *

Mr. Berke: As to 48 and 49, I object to them on the ground that they are irrelevant, immaterial. There is no showing here of the signatures on those cards and the signatures of the people whose names the people purport to be on those cards.

I object further on the ground no proper foundation has been laid for the receipt and their competency has not been established.

Trial Examiner: May I ask the purpose for introducing them?

Mr. Karasick: The union authorization cards?

Trial Examiner: Yes. [1748]

Mr. Karasick: To show those persons who are members of the union at the time the circumstances of this case occurred? I should think it would be self-evident according to the issues as framed in this complaint.

Trial Examiner: Assuming that to be true, can we take evidence of cards made out in block printing, for example, to be evidence of membership?

Mr. Karasick: I submit, Mr. Examiner, these are the original membership or authorization cards

(Testimony of William Grami.)

received by the union during the organizational campaign which went on during the 1954 season.

I have laid the foundation showing they were received in the normal course of business. They are part of the business records of the union; they are not perfect records any more than any business records may be. Such errors as may occur in them, such things which are short of perfection in them are things which you will have to weigh as a trier of facts. I can't change the facts. I can only produce them here.

These cards are the way they came to the union. I am offering them in good faith as full evidence of the union's records as to who was or who wasn't an adherent of the union at the time in question, and I am offering them as each one, as far as I know, being a card signed and turned in by a particular person as his individual name appears thereon, received in the normal course of the business of the union and [1749] part of the business records of the union.

Trial Examiner: Well, I will receive 48 and 49 in evidence without, of course, saying that they necessarily prove what you offer them for. [1750]

* * * * *

Q. (By Mr. Karasick): Mr. Grami, I hand you the union authorization card containing the name of Lois A. Thornton, marked as General Counsel's Exhibit 48-(98), and I would like to ask you with respect to that card, again calling your attention to the fact the year appears as 1950, this question:

(Testimony of William Grami.)

To the best of your knowledge, was or was not that card which you now hold in your hand received during the 1954 season at SAGU, received by the union in the regular course of business during the 1954 season at SAGU? A. Yes.

Q. Your answer is it was? A. It was.

Q. Do you have any explanation for why the year 1950 appears in there rather than 1954?

A. No; obviously it's an error.

Q. You will notice that the printed material of the card which begins with the words, "Authorized general Truckdrivers and Helpers Union Local No.," and after that there is a block and the number apparently has been blocked out, or at least there is a block there and above it in type or some form of [1751] printing in different print than the rest of the printing I have just read, appears the figures "980."

Do you notice that? A. Yes.

Q. Do you know how they got there?

A. I can only presume. Quite often we——

Mr. Berke: Just a moment. I am going to object to the assumption. If he doesn't know, he doesn't know.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Karasiek): Do you have any idea at all that would explain the figures that I have just pointed out to you? A. Yes.

Q. Would you explain it?

A. Quite often we either run out of place cards or borrow place cards from other locals if we can't

(Testimony of William Grami.)

get them printed quickly enough, and we black out the date—not the date, but rather the local number if it happens to be 624 or some other local, and enter the proper local number.

Mr. Berke: I move that be stricken as general and not confined to this particular card, what happened to it.

Trial Examiner: Motion denied. [1752]

* * * * *

Mr. Karasick: It is stipulated and agreed that General Counsel's Exhibit [1834] 40-G, entitled "Employees October 19, 1954," is a copy of that list of employees which was used as the eligibility list at the election conducted by the Board at the respondent's plant on October 19, 1954.

Is that a correct statement and do you so stipulate?

Mr. Berke: I so stipulate. And let the record show that at this time I am returning to the court reporter the copy of General Counsel's 40-G which I took from the duplicate exhibit file so that I might check the record, the company's records on it.

* * * * *

Mr. Berke: Now I would like to make a more specific motion to dismiss at this time, directing myself to specific allegations in the complaint about which I don't think there can be much quarrel.

Page 3, subparagraph 3, where the allegation reads: "In or about the latter part of September, 1954, the exact date being unknown, General Manager Elmo Martini threatened an employee with

physical assault unless said employee ceased his activities on behalf of the Union.”

Now I submit, Mr. Trial Examiner, that there isn't a shred of evidence to support that allegation, and I am urging quite seriously that the motion to dismiss that allegation be granted, because, since the hearing began, and each time that we have gone into recess and then resumed, both the press and news [1847] broadcasts on the radio, in referring to this proceeding, have constantly stressed that particular allegation and they have put more emphasis on it since an alleged assault upon one of the union representatives, leaving an inference and an innuendo which is completely unwarranted, and in light of the fact that there is absolutely no evidence to support that allegation, I submit that that allegation in the complaint should be dismissed at this time.

Trial Examiner: You oppose the motion, Mr. Karasick?

Mr. Karasick: I don't oppose that motion.

Trial Examiner: Motion is granted. [1848]

* * * * *

Mr. Karasick: Mr. Examiner, it is my understanding that counsel for the respondent and counsel for the General Counsel hereby stipulate and agree that C. E. Storey and Clarence E. Storey are one and the same individual; and that the name Louise Thornton, L-o-u-i-s-e Thornton, T-h-o-r-n-t-o-n, as it appears on page 6 of General Counsel's Exhibit 37, and also as it appears on General Counsel's Exhibit 42-C, is an error, and the name actually should be Lois, L-o-i-s Thornton.

Is that a correct statement and do you so stipulate and agree?

Mr. Berke: So stipulated. [1855]

* * * * *

ROLLO W. WINKLER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your full name for the record?

The Witness: Rollo Wilford Winkler.

Trial Examiner: And your home address?

The Witness: 3651 Frei Road, F-r-e-i, Sebastopol.

Direct Examination

Q. (By Mr. Berke): Dr. Winkler, you are by profession a dentist, are you?

A. That is correct.

Q. And are you practising your profession at the present time? A. No, I am not.

Q. Is it correct that you are retired from your profession? A. Yes. At this time I am.

Q. Now, do you own a ranch at the present time? A. Yes.

Q. And what do you raise on that ranch—well, strike that.

Did you own that ranch last year and preceding years? A. Yes.

Q. What did you grow on that ranch last year?

A. I grow all apples. [1856]

Q. And are you a member of the Sebastopol Apple Growers Union? A. Yes.

(Testimony of Rollo W. Winkler.)

Q. Were you a member of the Sebastopol Apple Growers Union in 1953 and 1954? A. Yes.

Q. Do you hold any office at the present time in the Sebastopol Apple Growers Union?

A. Yes.

Q. What office do you hold?

A. I am the Vice-chairman, and Chairman of the Executive Committee.

Q. Are you a member of the board of directors?

A. Yes.

* * * * *

Q. (By Mr. Berke): Now last year did you hold any office in the Sebastopol Apple Growers Union? A. Yes.

Q. What office did you hold?

A. I was in the same capacity last year.

Q. That is Vice-chairman of the board and Chairman of the Executive Committee?

A. Yes. I was also chairman of the, I believe it was [1857] chairman of the fresh marketing or the packing house committee, Fresh Apple Committee.

Q. Of the Sebastopol Apple Growers Union?

A. Yes. I wouldn't want to say—I wouldn't want to say I was chairman of that committee. I was on that committee.

Q. You were a member of that committee?

A. Yes.

Q. Was this last year that you are talking about? A. Yes.

Q. As a member of the Sebastopol Apple Grow-

(Testimony of Rollo W. Winkler.)

ers Union, are the apples from your ranch processed at the Sebastopol Apple Growers Union?

A. Yes, they are.

Q. Were they in 1954 and 1953?

A. Yes, they were.

Q. Now will you tell us what your duties were as a member of this Fresh Apple Marketing Committee that you served on last year? [1858]

* * * * *

A. Well—

Mr. Berke: Go ahead, if you remember the question.

A. (Continuing): As a member of the Fresh Apple Committee, it is our duty to watch the operation in our packing house, our deliveries of apples to the packing house, seeing that the apples are properly handled; that your bruising problem isn't too great, and checking the quality of the apples that come through and what percentage of culls are being culled out of the apples that the grower delivers, trying at all times to watch the thing so that the greatest return can be given the grower. That is primarily our duty and purpose and during the—and also, to help assist in marketing conditions, I was sent to Los Angeles during the marketing period to check the Los Angeles market when it had plugged with apples that couldn't be sold and were blocking our movement. That was part of the work which I did.

Q. (By Mr. Berke): Now did you perform

(Testimony of Rollo W. Winkler.)

those duties as a member of the Fresh Apple Committee in 1954? [1859]

* * * * *

Q. Now when apples were brought in to SAGU last year, where were they taken, will you tell us just what the procedure was?

A. Well the grower delivers his apples, orchard run, as they are picked from the tree, and he brings them to the packing house or he brings them to the plant and the apples are received and graded. A sample box is removed from each pallet—usually they are delivered on pallets—and each pallet of 36 boxes, usually one box is selected at random through the pallet and taken as a sample, to determine the grade of fruit or quality of fruit that the grower has in that load, and those are set aside and run over a special table.

The rest of the fruit is intermixed with other growers' fruit in the packing house and is run over the graders and the choice fruit is shipped to the fresh market whenever there are available orders, and the culls are separated from the choice fruit and which in turn goes to the cannery.

The cull is an apple which has varying types of defects, [1860] of which—oh, worms constitutes a cull, scab, misshapen apples and sunburned, overly bruised, or anything which defaces the surface of the apple makes it a cull and that apple is not fit for fresh shipment and in turn finds its way to the cannery.

Q. What about oversized or undersized apples, are those considered culls?

(Testimony of Rollo W. Winkler.)

Mr. Magor: I object to that on the grounds it is leading and suggestive. Let us have the witness' testimony.

Trial Examiner: Overruled. Go ahead.

A. Undersized apples are—well, first of all I will explain, in the state, we have a State Code which sets up the size regulation, and any apple of the Gravenstein variety which is smaller than 2-11/16ths automatically becomes a cull.

And large sizes are not controlled by Code or by order, but oversized apples as a general rule are hard to sell and if we don't have orders for size 88 to a box, they have, they necessarily have to go into the culls at that time.

* * * * *

Q. Now in connection with your duties as a member of the Fresh Apple Committee last year, were you required to be at the Sebastopol Apple Growers Union plant?

A. Was I required to be?

Q. Yes. Did your duties require you to be there?

A. Well, if you—I would say this: That if you was to do [1861] your work conscientiously, you would have to be there. I don't believe that our, I don't believe that we are directed to be there, but when we are placed on a committee we are naturally put there in order to give service to our organization. And I have taken the job conscientiously and I have always made it a point to visit the plant at least once every day and sometimes twice, spend-

(Testimony of Rollo W. Winkler.)

ing anywhere from a half to an hour in the morning and the same in the afternoon.

Q. And did you make such visits last year?

A. Yes.

Q. With that frequency? A. Yes. [1862]

* * * * *

Q. (By Mr. Berke): How long have you been growing apples, Dr. Winkler?

A. Well I have—I was born and raised on an apple ranch and spent my young life, as I went going through schools, on my father's ranch raising and picking apples. And after I graduated and became a dentist, I practiced for about until 1938. In 1938 I bought the apple ranch and I have been actively engaged in growing apples since that time.

Q. And how long have you been a member of the Sebastopol Apple Growers Union?

A. Ever since I have been in the apple business.

Q. And for how many years did you serve on the Fresh Apple Committee?

A. Well I have been, well I am not, I couldn't tell you whether I was on the Committee in '53 or not, on that committee. I can't remember for sure. I can't remember what committee I was on. I have been on the board for, oh, I believe this is my third or fourth year. I couldn't be sure.

Q. During the period of time that you served on the Sebastopol Apple Growers Union board of directors, did the board, while [1863] you were present, have occasion to consider the matter of the quality of the apple crop?

(Testimony of Rollo W. Winkler.)

A. Oh, yes. We always, we always evaluate the crop prior to our season, trying to determine what quantity of apples we will have for each segment of the industry. See, we engage in fresh shipments, canned shipments, and dried fruit, and it is quite important that we know what proportion of each, of the crop is going to be in each of these different segments of the industry, in order to know how we should price our fruit and how to prepare for taking care of it.

Q. Does quality have anything to do with determining the various segments, as you put it, into which the fruit will go?

A. Oh, yes, very definitely. When the quality of the fruit grown on the tree is good, you can expect a better proportion of it for the fresh market than if the quality is poor; why, then a greater proportion has to go to by-products.

Q. All right. Now will you tell us, based upon your experience and your observation, what the quality of the 1954 apple crop was? [1864]

* * * * *

A. The 1954 apple crop was approximately 50 per cent of processing apples, or, in other words, culls. As I mentioned before, defects is the cause of that, and last year, due to early frost, weather conditions, aphids, we had a rather large percentage of culls over a normal year. [1866]

* * * * *

Q. (By Mr. Berke): Now you say that approximately 50 per cent of the apples were processing

(Testimony of Rollo W. Winkler.)

apples. Would you please explain what you mean by that?

A. Well, any apple which doesn't meet the certain standard which I mentioned a moment ago to qualify it as a choice shipping apple, becomes a cull which finds its way to processing channels. And any apple which doesn't meet the required size finds its way to processing channels, and the 50 per cent that I mentioned is made up of small, overly large, and defective apples. [1867]

Q. And are you talking about the 1954 crop that came into Sagu? A. That is correct.

Q. Now when you say approximately 50 per cent of the apples last year found their way into processing channels, what do you mean by "processing channels"?

A. Well we have the—first of all, the apple sauce, which is a by-product of our operation. And we call an apple that goes to a cannery a processing apple, an apple that is changed from its present state to some other form. And the small apples are crated, are used to make juice; the apples that are too small for peeling for the cannery are sold or manufactured into juice.

The waste material from the peelings and coring of the apple is made into what we term a concentrate. So that actually the entire apple all the way through is consumed. We don't throw away any portion of it, excepting that which rots.

Q. Now did the apple situation last year as you have described it become the subject of discussion

(Testimony of Rollo W. Winkler.)

with the General Manager of the Sebastopol Apple Growers Union; will you just answer "yes" or "no"?

The Witness: Will you please state the question again?

Mr. Berke: Yes. Would you give him the question?

(Question read.)

A. Yes. [1868]

Q. (By Mr. Berke): Now who was the general manager of the Sebastopol Apple Growers Union in 1954?

A. Mr. Martini.

Q. That is Elmo Martini?

A. That is right.

Q. And did you discuss the apple situation with him as you have described it?

A. Yes.

Mr. Karasick: Object to "as you have described it" as being leading and suggestive; move to strike the answer.

Trial Examiner: Denied.

Q. (By Mr. Berke): Did you have more than one discussion with Mr. Martini?

A. Yes.

Q. When was the first time that you had such a discussion, as near as you can recall?

A. Well the first, the first time the situation became, I might say, urgent, after we had been shipping apples for perhaps a week to ten days.

Q. In what month is this you are talking about?

A. As I recall, we opened our season last year around the 18th or the 20th of July, and after we had shipped for approximately a week to ten days the market became very sluggish and our movement

(Testimony of Rollo W. Winkler.)

of fresh apples became very slow, and our volume of apples being received at that time began to become greater [1869] and greater each day, and it became apparent that we were going to have to do something to correct the situation or we would have to slow up the picking of apples.

So Mr. Martini sent another director and I to Los Angeles to look over that situation down there and to determine what our move should be to meet the situation. We found the market completely filled with green apples and the buyers were in a non-receptive mood to the Gravenstein at that time.

So we came back, made our report——

Q. Who did you make your report to?

* * * * *

Trial Examiner: Motion denied.

Q. (By Mr. Berke): Who was the other director? A. Mr. Guerrazzi, Lee Guerrazzi.

* * * * * [1870]

Q. O.K. Now about when was it that you and Mr. Guerrazzi reported back to Mr. Martini?

A. Well I believe it was right around the 25th of July, right in that area. I wouldn't be positive.

Q. And where was this report made?

A. We reported back to Mr. Martini at his office at SAGU.

Q. And when you refer to "SAGU", is that the same as Sebastopol Apple Growers Union?

A. That is right.

Q. And who was present on the occasion of your reporting back to Mr. Martini?

(Testimony of Rollo W. Winkler.)

A. I don't recall who was present at the time we reported at our first report to him when we returned, but a very short time afterwards we reported to the entire board at a board meeting.

Q. No. I am talking now about the period about the 25th of July, when you reported to Mr. Martini. Was Mr. Guerrazzi present?

A. Yes.

Q. Were you? A. Yes.

Q. Mr. Martini? A. Yes.

Q. Anybody else that you can recall?

A. I can't remember whether there was or not.

Q. All right. Will you tell us what was said in that conversation [1871] and identify who was speaking, please?

Mr. Karasick: I object as being immaterial and irrelevant.

Trial Examiner: Overruled.

A. Well I can tell you what—the report that I gave to Mr. Martini was this, that we found in the market in Los Angeles approximately 19,000 boxes of green apples that were in cold storage and in bad shape in many instances.

Q. (By Mr. Berke): What do you mean by "bad shape"?

A. There was considerable bitter pitch showing up in them and they just simply looked rough. They were not an appealing apple at all, and the buyers were having a difficult time moving them. We went to our marketing men in the market—

Q. Excuse me for interrupting you. Is this

(Testimony of Rollo W. Winkler.)

what you told Mr. Martini? A. Yes.

Q. All right. Go ahead.

A. I told him we went to our marketing man and asked his advice on what we should do. At that time he told us that it might be well if we could declare a holiday and give the market a chance to clear up.

And we had met with our own broker while we were there and we told Mr. Martini what our broker advised us to do, which was practically the same thing.

And my idea at that time to Mr. Martini was that we shipped our fruit entirely too green. I told him how badly [1872] the stuff looked, and the whole trouble in our shipping deal was the fact that we were sending our apples down there too green. And the only thing I could see to do would be to curtail the shipments until they moved them out, until they had a chance to move those green apples out of the way.

Q. Was there anything more said in that conversation that you recall?

A. No. That is the general report that we gave.

Q. Now when was the next time that you had a discussion with Mr. Martini about the apple situation in 1954?

A. Shortly following that time; I couldn't tell you the day at all.

Q. How long after?

A. I would think that in the following two weeks our growers delivered lots more apples to our plant

(Testimony of Rollo W. Winkler.)

than we could ship out. The apples were starting to get ripe, starting to mature, and the picking started to come in very heavy.

And I started urging Mr. Martini to find outlets and sales for those apples, to prevent them from building up on our hands and causing us a loss.

And, as time went on, the situation became worse and worse, and, as our fruit matures, when it reaches a certain maturity we are able to go to cold storage with it. We filled our cold storage plant. We filled up all the available space we had surrounding our plant with grower-picked fruit. And the [1873] market gradually begin to improve a little bit; green stuff got out of the way, and we started moving some apples and, of course, all the time our cannery was going. [1874]

* * * * *

Q. All right. Now on the second occasion that you talked with him, do you recall who was present?

A. No.

Q. And you say this was during the first week of August, 1954? A. Yes.

Q. All right. Now will you tell us what that conversation was with Mr. Martini?

A. Well I simply told him this, that we are getting so much fruit piling up here that we are going to have to do something in order to get rid of it before it starts to spoil, and I urged him to find, see if he couldn't find a sale for it, or to find someone that would can it for us. [1876]

* * * * *

(Testimony of Rollo W. Winkler.)

Q. (By Mr. Berke): Do you recall when you first discussed the matter of the cold storage and the warehousing?

A. Well the first, the first time we discussed the cold storage situation was when the market was not taking our fresh apples fast enough to keep them out of our way.

Q. When was that?

A. I believe it was right along in the last week of July.

Q. All right. Did you discuss—

A. We discussed the advisability of putting, starting to put our apples into cold storage, and we made tests on them to [1877] determine their maturity. And I couldn't tell you the exact date we started to fill the cold storage, but it was right about that time, right around the 1st of August.

Q. Did the cold storage ultimately become filled?

A. Yes.

* * * * *

Q. (By Mr. Berke): What was the warehousing situation at SAGU in 1954?

A. Well we have, we have one large warehouse which is separated from the rest of our plant, and we have one small warehouse which is in conjunction with our cannery.

Q. Was the warehousing utilized to capacity in 1954 at the SAGU plant? A. Yes.

Mr. Karasick: Object to the form of the question.

Trial Examiner: Overruled.

(Testimony of Rollo W. Winkler.)

Q. (By Mr. Berke): And did it ever reach a point during the 1954 season where the warehouse capacity was completely used? [1878]

* * * * *

A. Yes.

Q. (By Mr. Berke): When did that occur?

Mr. Karasick: Now what is it, warehousing or cold storage?

Mr. Berke: I am asking about the warehouse.

A. Well our warehouse capacity became filled on, as I recall it was along in the early part of September.

Q. (By Mr. Berke): Now what went into cold storage in 1954? Will you tell us what?

A. What went into cold storage?

Q. Yes. A. Well, we as a general rule—

Q. Now tell us about 1954, Dr. Winkler, not the general rule.

A. Well, the cold storage was filled with grower fruit picked direct from the field, picked direct and hauled from the field and graded and placed directly into cold storage. It was also filled with cull apples that were in excess of apples that could be handled by the cannery daily. [1879]

Q. And what in 1954 was stored in the warehouse?

A. Our warehouses are for canned applesauce.

Q. Now was the warehousing situation discussed at SAGU last year? A. Yes.

Q. Where did such discussion take place, and with whom?

(Testimony of Rollo W. Winkler.)

A. Well we had a discussion on our warehousing problem in the board meeting.

Q. And do you recall which board meeting such a discussion arose?

A. Well, we had our regular board meeting in September. We discussed the problem of warehousing, and it was filled at, was practically full in our September meeting.

Q. Now when was that September meeting, as near as you can recall?

A. Our meetings are the second Wednesday of every month. [1880]

* * * * *

Q. (By Mr. Berke): Was Mr. Martini present at that meeting? A. Yes.

Q. Was Mr. McGuire present, if you recall?

A. Yes.

Q. Now will you tell us what was discussed at that meeting, with respect to the warehousing situation at SAGU? [1881]

* * * * *

A. Well, Mr. Martini reported to us that our warehouse was full and we had room for very little more sauce, and wanted to know what we wanted to do about it.

We discussed the situation, and I myself, I remember distinctly, I myself made a motion that we discontinue our night shift and that we go along with a day shift canning our apples and making as many direct sales as we could, in order to relieve the situation and——

(Testimony of Rollo W. Winkler.)

Q. (By Mr. Berke): This—excuse me, go ahead, finish. I just wanted to fix the time. Is this the meeting the second Wednesday in September you are talking about? A. Yes.

Q. All right, go ahead.

A. As I say, I made that motion that we discontinue the night shift and go on a one-shift basis, and left the closing of the night shift to the discretion of our manager as he saw fit to cut it off; whether it was today, tomorrow, or next day we weren't particularly interested in, but whatever would best fit [1882] his management. [1883]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Karasick): Now Plant No. 5 was a former packing plant which was located in Molino Corners; that is where the cannery itself is located you have indicated; is that right?

A. That is right.

Trial Examiner: Talk up please.

The Witness: Yes.

Q. (By Mr. Karasick): That was used as a storage shed and packing plant in years prior to 1954; right? [1890]

A. Yes. It has always been a packing shed prior to our cannery.

Q. Yes. Now in 1954, however, that plant was, No. 5, Molino Corners, was converted to a can warehouse, was it? A. That is correct.

Q. And that work was completed in August of 1954; is that correct?

(Testimony of Rollo W. Winkler.)

A. Well I do not know exactly. It was somewhere along there, I presume. I don't remember what time, exactly what time it was finished, but it was done last spring.

Q. And it was finished before the season ended, was it? A. I believe so.

Q. As a matter of fact, shortly after the season began, really. The season began in the middle or latter part of July, didn't it, packing?

A. Yes, started along the middle part of July.

Q. And so that the plant we are talking about, No. 5 plant, would be converted shortly thereafter, within a month or six weeks thereafter, as far as you remember?

Mr. Berke: Will you speak up? Your nod can't be recorded.

A. As far as I remember, it was completed right along in that period. I wouldn't want to say exactly; I don't know. [1891]

* * * * *

Q. (By Mr. Karasick): Now wherever it was that you had this conversation with—strike that.

When you had the discussion at the board meeting, and I don't want to pin you down because you have indicated you don't remember which date it was, whether September or October, wherever it was, at that discussion you made that motion, it was about that time or shortly before that you came to the point where you felt that you were getting topheavy or overloaded [1898] with apples

(Testimony of Rollo W. Winkler.)

and should lay the Group 1, the night shift, off; is that right?

A. Well we were conscious of the fact that we were topheavy with apples quite a little while before that.

Q. But that was the point you felt that you had reached, where it would be necessary to consider this action that you moved to take; is that right?

A. Well, let me answer you this way: The action that we took to cut the night shift off was made after we got rid of this large bulk of apples that was stored outside that was giving us the headache and rapidly spoiling. And I believe there was about a 700-ton spoilage, or something to that effect. I don't remember whether those are accurate figures. But we had a large spoilage of this outside fruit.

But, the decision to turn the night shift loose was made after we had worked this surplus of fruit out of the way and the remainder of our fruit was left in cold storage where we could handle it.

Q. How did you work the surplus out?

A. We sent the surplus down to the Cooperative Cannery, which we are a member of, to be canned.

Q. Yes. Do you remember when that began?

A. Oh, I don't know the exact dates, but I think we started in in August and we took some down in August and then, as I recall, we stopped for a while. I think their growers begin [1899] giving them all that they could handle for a while. And we were

(Testimony of Rollo W. Winkler.)

cut off for a while. And again we started up delivering again in September. Now the exact dates I don't know.

Q. So that you sent these apples to the Cooperative, and then your recollection is that some time in August they couldn't handle it any more because their growers were sending them more than they could handle?

A. That is right. I think along the latter part of August they started to take some, and then as I recall the pressure from their growers was great enough that we weren't able to get any more in temporarily and we had a little lull between, and when theirs begin to slack up a little down there, why, then we were able to continue delivering.

* * * * * [1900]

Q. (By Mr. Karasick): Now that being so, Dr. Winkler, can you tell us, since you have testified as to your knowledge and expertness in this field previously, whether the apple crop for [1904] the county last year was greater or less than the apple crop for the county was the year before, of 1953?

* * * * *

A. Yes, it was larger in '54 than in '53. [1905]

* * * * *

Q. Now with respect to the meeting at which the matter was discussed concerning the layoff of one shift, the night shift, as you indicated you were the only one who made a motion to that effect?

A. That is correct.

(Testimony of Rollo W. Winkler.)

Q. As far as you can recall, you were the only one who spoke about the matter?

A. I was the one who made the most pointed remarks concerning it.

Q. Do you remember any remarks anyone else made concerning it? A. No, I don't.

Q. Now the motion was made that the question as to—strike that.

There was no decision made by the board of directors at that meeting, whenever it was held, as to when the layoff should occur, was it?

A. No. We left it at the discretion of the manager. However, we indicated that it should be done as soon as possible.

Q. But no date set? A. No.

Q. Now what were the considerations that led you to this, [1908] again, please?

A. What was the considerations?

Q. Yes. What consideration led you to make this motion and to have it adopted by the board?

A. Well, we had reached the point where our surplus apples were out of the way. We had sent them out and had them canned. And our warehouse space was filled, and it is our general practice, whenever we reach the point where we can handle our final supplies of apples with one shift, we always do so. We have done it in the past. We are doing the same thing this year; will do the same thing in a matter of years, and it is just the natural trend of our operation. And it was based on that grounds.

Q. Any other considerations?

(Testimony of Rollo W. Winkler.)

A. Not that I can think of. Only the fact that it was the most economical and sound operational practice, in order to give the best returns to our growers. That is the basis for all of our decisions, or my decisions. [1909]

* * * * *

Q. (By Trial Examiner): You testified to a certain spoilage of apples. In what form or state of packing or storage were those that spoiled?

A. Most of those that spoiled were stacked outside of our storage plant on our—we have a concrete apron around in our plant, and after our cold storage plant was filled, our overflow was just stacked up on pallets three high around the [1928] building in the open.

Q. How long did they remain there?

A. Well some of them were there, I don't know exactly how long, but they were there long enough that they started to rot.

Q. I am rather ignorant on this—

A. Well, I would say some of them were there three to four weeks.

Q. In the meantime, were more apples coming in? A. Coming in all the time, yes.

Q. And then the apples were being used for the cannery direct from those that were outside?

A. They were being used, they were being used in wherever the cull was being used for the cannery; any amount of apples over and above the amount of culls that we'd have on daily run we'd use from the stockpile to fill in. But generally speaking we

(Testimony of Rollo W. Winkler.)

run our culls through the cannery and we generally try to do it directly. However, when our culls run heavy our cannery won't handle a full capacity of the culls. Then we have to take them and store them in cold storage.

Q. Well what I am trying to get at is this: You stacked so many apples outside of the warehouse? A. Yes.

Q. Now were some of those apples that were to be used for fresh pack?

A. Not after they have set. The law requires that the apple [1929] must be packed, I think it is—I have forgot the days—two or three days, only length of time they allow you. An apple picked from the tree without storage is a very minimum amount of time, and after it sets a few days it can no longer be used for fresh shipment, unless it is cold storage.

Q. Then apples that were outside, that were piling up outside would, if they were used at all, be used in the cannery, wouldn't they?

A. That is right.

Q. Do you recall the time when those apples began piling up outside?

A. Yes. They started piling up outside in the latter part of, in the latter part of August, I would say from the middle of August through the latter part of August they started piling up. That is usually our peak. [1930]

* * * * *

EZRA BRIGGS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Berke): Mr. Briggs, do you own or manage or lease an apple ranch? A. I do.

Q. Do you own—how many acres do you own, first? A. Five.

Q. And do you lease or manage an apple ranch in addition to the five acres you own? A. I do.

Q. Well, which is it, do you lease or manage?

A. Manage.

Q. How large a ranch is that?

A. Thirty acres of apples.

Q. What ranch is that that you manage? [1944]

A. Ruth W. Finley.

Q. And where is that located?

A. High School Road, Sebastopol.

Q. And where is your own ranch located, the one that you own? A. Cooper Road, Sebastopol.

Q. And did you manage the Finley ranch last year in 1954? A. I did.

Q. How many years have you managed that ranch? A. Since 1927.

Q. And how many years have you owned your own ranch? A. Since 1932.

Q. Now, last year, that is 1954, how many tons of apples were produced on your own ranch?

A. Approximately 20.

Q. And in 1954, how many tons of apples were

(Testimony of Ezra Briggs.)

produced on the Finley ranch? A. 250.

Q. Are you personally a member of any cooperative apple organization in the Sebastopol area?

A. Cooperative Cannery.

Q. And is the Finley ranch or Mrs. Finley a member of any apple cooperative in the Sebastopol area?

A. Sebastopol Apple Growers Union, the Sebastopol Cooperative Cannery, and Green Valley Drier.

Q. That is the Finley ranch or Mrs. Finley is a member of [1945] those three organizations?

A. That is right.

Q. And was that true last year? A. Yes.

Q. And with respect to your membership in the Sebastopol Cooperative Cannery, were you a member of that organization last year?

A. Personally?

Q. Yes. A. Yes.

Q. Now, do you hold any office in the Sebastopol Cooperative Cannery? A. I do.

Q. And what office is that?

A. President of the board.

Q. By the board, do you mean the board of directors? A. Yes.

Q. Did you hold any office in the Sebastopol Cooperative Cannery last year? A. Yes.

Q. And what office was that?

A. Chairman of the board.

Q. Is there a difference between president of the board and chairman of the board? A. No.

Q. So when you referred to president of the

(Testimony of Ezra Briggs.)

board previously, was that the same position that you held last year? A. Yes.

Q. Do you hold any office in the Sebastopol Apple Growers Union?

A. Not at the present time.

Q. Did you this year at all?

A. Up until July.

Q. What office did you hold until July of 1955?

A. Director.

Q. Did you hold any office in the Sebastopol Apple Growers Union last year, 1954?

A. Yes.

Q. What office did you hold?

A. Director.

Q. Now, for how many years were you a director of the Sebastopol Apple Growers Union up until July of this year? A. Three years.

Q. And for how many years have you been chairman of the board of directors of the Cooperative Cannery? A. Since 1951.

Q. For how many years have you been a member of the Sebastopol Cooperative Cannery?

A. Since '49.

Q. 1949? [1947] A. That is right.

Q. And for how many years has the Finley ranch been a member of the Sebastopol Apple Growers Union? A. Since 1927.

Q. I don't recall whether I asked you this. It may be repetitious. For how many years have you managed the Finley ranch? A. Since 1927.

(Testimony of Ezra Briggs.)

Q. And for how many years have you owned your own ranch? A. Since '32.

Q. Now, last year where did the Finley apples that were harvested on the Finley ranch go to?

A. SAGU, Coop Cannery, Green Valley Drier.

Q. By "SAGU" do you mean the Sebastopol Apple Growers Union? A. Yes.

Q. And by "Coop Cannery" do you mean the Sebastopol Cooperative Cannery?

A. Yes, I do.

Q. And where did the apples from your ranch go to?

A. Sebastopol Cooperative Cannery, and Green Valley Drier.

Q. Now, the apples that went to the Green Valley Drier from both the Finley ranch and your own ranch, were those apples that came off the, that were picked off the tree for that purpose to be taken to this drier?

A. Would you repeat that again? [1948]

Mr. Berke: Would you give him the question.

(Question read.)

A. No.

Q. (By Mr. Berke): What apples were those?

A. They were windfalls.

Q. What do you mean by "windfalls"?

A. Apples that drop off the tree on the ground.

Q. Did you last year serve on any committees at the Sebastopol Apple Growers Union?

A. I did.

Q. What committee did you serve on?

(Testimony of Ezra Briggs.)

A. Cannery committee.

Q. Will you describe the functions and duties of that committee?

A. We check the quality with the quality control lady each day.

Mr. Karasick: I am sorry, Mr. Briggs; with your back turned somewhat to me I can't hear.

Trial Examiner: Will you face this way, please?

Will you read the answer.

(Answer read.)

Q. (By Mr. Berke): Will you go ahead?

A. (Continuing) And also check the amount of fruit that was canned, the amount of fruit that was accumulating to be canned.

Q. Is that a general description of the duties of the [1949] committee?

A. Yes, sir, at that time of year.

Q. Pardon? A. That time of year.

Q. What do you mean by "that time of year"?

A. Canning season.

* * * * *

Q. All right. Now, last year, as a member of the board of directors of SAGU, and as a member of the cannery committee, [1950] did you have occasion to, during the course of the season, observe the quality of the apple crop that was delivered to the Sebastopol Apple Growers Union?

A. Yes.

Q. How often did you have occasion to observe the quality of that crop? A. Daily.

(Testimony of Ezra Briggs.)

Q. Can you tell us what you observed with respect to its quality?

A. The quality was, I would say, poor, due to the defects of the fruit.

Q. Well, what do you mean by defects; what kind of defects?

A. We had a frost and some of them was frost-bitten, lopsided.

Q. Lopsided—is that what you said?

A. That is right. Which made it so they wouldn't go for shipping apples. [1951]

* * * * *

Q. (By Mr. Berke): Well, did you, in addition to observing the quality of the crop, observe the quantity of the crop in 1954? A. I did.

Q. And did the matter of both the quality and quantity of the crop become a subject of discussion in which you participated? A. Yes.

* * * * *

Q. Now, you say that the quality and the quantity of the apple crop delivered to SAGU became a subject of discussion. Was it a subject of discussion more than once? A. Yes.

Q. When was the first time that it became a subject of discussion, approximately when?

A. About August 27.

Q. 1954? [1952] A. That is right.

Q. And where was it discussed?

A. In SAGU, right there by the cannery.

Q. Are you referring to on the SAGU premises?

A. That is right.

(Testimony of Ezra Briggs.)

Q. And who participated in this discussion?

A. Myself and Mr. Martini that day.

Q. Anyone else present within the immediate area of the conversation? A. No.

Q. Will you tell us what was said and who said it?

A. I said to Mr. Martini: "The apples, the culls are increasing on us and we should figure some way to dispose of them otherwise, either can them or send them to a drier."

Q. And what, if anything, did Mr. Martini say?

A. He said: "I think the crop is at the peak and I think I can handle it."

* * * * *

Q. Now, when was the next time that it became a subject of discussion?

A. Along about the 5th of September. [1953]

Q. And where did that discussion take place?

A. About the same place, on SAGU property, at the cannery. Mr. Cordoza was there, myself, and Mr. Martini.

Q. Who is Mr. Cordoza?

A. One of the directors.

Q. Of what? A. SAGU.

Q. And just the three of you were present in this conversation? A. That is right.

Q. Will you tell us what was said then and who said it?

A. I said to Joe, I said: "The culls are increasing on us——"

Q. Wait a minute—who is Joe?

(Testimony of Elmo Martini)

A. Joe Cordoza.

Q. All right.

A. Continuing ("We should do something about it. They are going to spoil on us.")

Q. Was Mr. Martini present when you said that?

A. He was.

Q. All right. Go ahead.

A. And Elmo Martini again at that time said that he was sure he could handle them. And that is where the discussion stopped.

Q. Now, you have related in that conversation that you said that the culls are increasing on us. Tell us whether or not that was based upon an observation by you of the crop out at SAGU? [1954]

A. It was observation of the amount of culls that were setting right in front of us. [1955]

* * * * *

Trial Examiner: Well, was there or was there not any increase in the number of culls that you observed at the SAGU plant between the dates of the two conversations?

The Witness: Yes.

Mr. Berke: "Yes" what?

The Witness: There was.

Mr. Berke: Well, finish—"Yes" what, there was what?

The Witness: More culls.

* * * * *

Q. (By Mr. Berke): Now, was there a further conversation with respect to the apple situation in 1954 at SAGU? A. Not at that time.

(Testimony of Ezra Briggs.)

Q. Pardon? A. Not at that time.

Q. Well, was there at a later time? A. Yes.

Q. When, approximately when?

A. About the 10th.

Q. Of what? A. September.

Q. 1954? [1956] A. Yes.

Q. And where did that conversation take place?

A. On the SAGU property there at the cannery.

Q. And who was present on that occasion?

A. Mr. Cordoza, Mr. Martini, myself.

Q. Was there anyone else in the immediate presence of your conversation? A. No.

Q. Will you tell us the conversation on that occasion, and please identify who is speaking?

A. I said to Joe and Elmo at that time, I said: "The culls are increasing more. I think we should do something about it."

And at that time Elmo agreed that he was overloaded and that it was beginning to spoil. That was along about the 10th. Which he did do.

Mr. Magor: I move to strike the last answer on the ground it contains opinions and conclusions of the witness about Mr. Martini or Elmo agreeing. Let's have the conversation.

Mr. Berke: All right, we will get that.

Q. (By Mr. Berke): What is it that Mr. Martini said, as near as you recollect?

A. He said: "Well, I will go and find some place to put them."

And I said: "Well, we will can them for you at the Coop or we will take them to a drier."

(Testimony of Ezra Briggs.)

And he said: "I will hunt up a place right away."

* * * * * [1957]

Q. (By Mr. Berke): Now, was there anything further in that conversation?

A. Not at that time.

Q. Was there any subsequent conversation about that same subject that you recall?

A. What do you mean "subsequent"?

Q. A later conversation? A. No.

Q. Now, between the time of the second conversation that you related and this last one, did you observe whether or not there was an increase in the culls?

* * * * *

A. I did, yes.

Q. (By Mr. Berke): And what was that, was there an increase or decrease? [1958]

Mr. Karasick: Object to the question.

Trial Examiner: Overruled. Go ahead.

A. Yes.

Q. (By Mr. Berke): "Yes" what?

A. There was.

Q. So the record is clear, "Yes, there was" what, Mr. Briggs? A. More culls.

Q. Now, on the occasion of the first conversation in the latter part of August you have testified about, where were the apples at SAGU that you observed?

A. We had one cold storage room full and we had a bunch stacked in the yard.

Q. And how were they stacked in the yard, in what? A. In boxes on pallets.

(Testimony of Ezra Briggs.)

Q. And on the occasion of the second conversation in early September, where were the apples that you observed at that time?

A. We still had the cold storage room full and we still had stacks outside.

Q. And on the occasion of the third conversation, where were the apples that you observed at that time?

A. They were still one storage room full and still stacks outside.

Trial Examiner: Still one storage room, did you say?

The Witness: Yes.

Q. (By Mr. Berke): What do you mean by one storage room? [1959]

A. The Apple Growers Union has two storage rooms. One was filled with fresh fruit to ship. The other had these culls in it.

Q. And were there any apples on that occasion stacked outside? A. There was.

* * * * *

Q. (By Mr. Berke): Now, Mr. Briggs, to your knowledge, was SAGU last year a member of the Sebastopol Cooperative Cannery? [1960]

* * * * *

The Witness: Now, what am I answering?

Mr. Berke: Whether or not SAGU was a member of Sebastopol Cooperative last year?

A. Yes. [1961]

Q. (By Mr. Berke): Now, will you please, Mr. Briggs, explain what is meant by being a member

(Testimony of Ezra Briggs.)

in the cooperative? Tell us how you acquire a membership or become a member?

Mr. Karasick: May I have a continuing objection to this entire line of questioning?

Trial Examiner: You may.

Go ahead.

The Witness: I may answer?

Trial Examiner: Yes.

A. A member has to, a person has to send their name in there and it comes before the board of directors before they become a member. Then they are taken in as a member and they put up so much money and from then on it comes out of, percentage of money on the amount of fruit they deliver. Some years we hold out \$5; sometimes it is 7½; sometimes 10.

Q. When you say 5 or 7½, what is that based on? A. Per ton.

Q. And where does that money go to?

A. Goes into a revolving fund to operate the business.

Q. And then what happens at the end of the season to that revolving fund if there are any moneys left in it?

A. It revolves and after so many years it goes back to the grower, whatever isn't used.

Q. What do you mean by "it revolves"? I don't quite understand that. [1962]

A. Every five years we try to return them what they put in this year. If we take out \$10, five years

(Testimony of Ezra Briggs.)

from now they get what is left of that \$10. Might be \$7.50; might be the full \$10.

Q. In other words, there isn't a distribution made of the balance in the revolving fund every year; is that what you are saying?

A. No. It is five years before that they get.

Q. Well, this distribution is made every five years?

A. We try to make it every five years. It is up to the board of directors.

Trial Examiner: May I ask a question, please?

Mr. Berke: Sure.

Q. (By Trial Examiner): Is this amount that is retained based on a budget or something like that?

A. It is a working capital, of course. We don't sell any stock or anything like that but we do keep out so much a ton.

Q. I was wondering how the amount for each year is determined. Is that determined on a budget basis? A. That is right.

Q. (By Mr. Berke): May it vary then from year to year as to the amount you will take out per ton? A. That is right, yes.

Q. Do you know when SAGU became a member of the Sebastopol Cooperative Cannery? [1963]

A. In 1950.

Q. Did, in 1954, the Sebastopol Cooperative Cannery pack and ship fresh apples?

A. Yes.

Q. And did it in that year also can apples?

(Testimony of Ezra Briggs.)

A. Yes.

Q. Now, based upon your service both at Sebastopol Apple Growers Union and at the Sebastopol Cooperative Cannery, do you know what is done with the canned apples?

Mr. Karasick: Object to that.

Trial Examiner: Why?

Mr. Karasick: No proper foundation laid.

Trial Examiner: Well, the question is whether he knows what happens to it. If he says "Yes", why, then the basis of his knowledge becomes important. I will permit it.

A. Yes.

Q. (By Mr. Berke): All right. Now, will you tell us what happens to the canned apples after they have been canned?

Mr. Karasick: This is SAGU?

Mr. Berke: Yes. At SAGU.

A. They are stored in the warehouses.

Q. Now, were they stored last year in the warehouse? A. Yes.

Q. Now, is there a particular type of warehouse that is required to store canned apples? [1964]

A. Yes.

Q. What type of warehouse is required?

A. Insulation.

Q. Did SAGU have an insulated warehouse last year? A. Yes.

Q. Did they have more than one? A. No.

Q. Now, why is it necessary to store canned apples in an insulated warehouse?

* * * * *

(Testimony of Ezra Briggs.)

A. Change of temperature in a warehouse causes the cans to sweat and rust if it is not properly insulated.

Q. (By Mr. Berke): Does rust have an effect upon the grading of the canned apples? [1965]

* * * * *

A. Yes.

Q. (By Mr. Berke): Will you tell us what effect it has on the grading, Mr. Briggs?

A. A small amount of rust can be cleaned with steel wool or sandpaper and be sold as a No. 1. If it is very much rust, it has to be degraded, sold to junkies.

If it is a lot of rust, it is condemned and has to be punctured and throwed away.

Q. Have you, during your service as a member of the board of both SAGU and the Sebastopol Cooperative Cannery, had any experience with rusting of cans containing apples? A. Yes.

Q. When did you have such an experience?

A. In '50's pack.

Q. And whose pack was that?

A. Belonged to Sebastopol Apple Growers Union and Sebastopol Cooperative Cannery.

Q. And where was that pack warehoused?

A. It was packed in one of their apple sheds on High Street, [1966] Sebastopol.

Q. In whose apple shed?

A. Sebastopol Apple Growers Union.

Q. And do you know what number that building had, do you recall?

(Testimony of Ezra Briggs.)

A. I believe they call that No. 2.

Q. Was that an insulated warehouse?

A. No.

* * * * *

Q. (By Mr. Berke): Did you see the condition of the pack in that warehouse? A. I did.

Q. Will you tell us what you observed? [1967]

* * * * *

A. I was there, helped taking the cans out, saw that the cans was rusty. They had to be transferred back to the main building and cleaned at the Sebastopol Cooperative Cannery.

Q. (By Mr. Berke): Now, do you know whether or not cleaning of the cans, of those cans, involved any added costs to SAGU and the Sebastopol Cooperative Cannery? A. Yes.

Q. Did they involve added costs? A. Yes.

Mr. Berke: You may cross-examine. [1968]

Cross Examination * * * * *

Q. (By Mr. Karasick): When did SAGU join Sebastopol Cooperative Cannery? A. '50, 1950.

Q. Now, how do you know that?

A. Because in '50 we packed for them.

Q. Who is "we"?

A. Sebastopol Cooperative Cannery.

Q. Were you on the board of directors of Sebastopol Cooperative Cannery in 1950?

A. Yes, I was.

Q. And what did you pack for them that year?

A. What did we pack?

(Testimony of Ezra Briggs.)

Q. Yes. A. Apples.

Q. I know. But what kind of apples, apple sauce, apple slices? A. Apple sauce. [1993]

Q. And do you remember the quantity?

A. No.

Q. 1950, SAGU didn't even have a cannery in operation, did it? A. No.

Q. Now, since 1951 do you know of any relationship between SAGU and Sebastopol Cooperative Cannery, from '51 to the present time?

A. '54 we canned for them.

Q. Before that, to the best of your knowledge, there hadn't been any canning between '50 and '54, had there? A. No.

Q. In other words, all of the canning by SAGU was done with the fruit that its grower members had sent in to it? A. That is right. [1994]

* * * * *

Q. (By Mr. Karasick): Let me see if we can straighten it out this way, Mr. Briggs. No. 5 plant last year, which was the plant located at Molino Corners where the cannery is, was converted to a can warehouse, was it not? A. Yes.

Q. And the work on that was completed in August, 1954, was it not?

A. I don't remember the date, but it was completed in '54.

Q. It was completed shortly after the season began, was it not? A. That is right.

Q. And before that there hadn't been a similar can warehouse except the small area connected with

(Testimony of Ezra Briggs.)

the cannery itself; isn't [1998] that right?

A. That is right. [1999]

* * * * *

Recross Examination * * * * *

Q. (By Trial Examiner): Referring to these conversations that you had with Mr. Martini about August 27 and September 5 in which he told you that he felt that he could handle it, by that did you understand him to mean by using the apples in the cannery there? A. Yes.

Q. You didn't understand that he meant to ship any of them out at that time?

A. No. Not of that quality.

Q. And after your conversation of September 10 or approximately that date, did you notice how soon after that he disposed of the apples that were standing around in the yard?

A. Some three or four days. [2014]

Q. Did he get rid of all of them?

A. As fast as he could.

Mr. Karasick: I object to that; move it be stricken as obvious hearsay.

Trial Examiner: I will strike that.

Q. (By Trial Examiner): What I am talking about is, to your observation were there still apples stacked outside following that conversation, and if so, for how long?

A. I noticed in the next three or four days that the apples begin to move. And from then on it was probably two weeks or more before they was gone, maybe three weeks. I don't know that exact amount

(Testimony of Ezra Briggs.)

because I noticed they begin to move out. That was what I was interested in.

Q. Do you know whether or not they removed any of the apples from cold storage, or only those that were outside?

A. Both. That is on the Gravenstein.

Q. Do you know where the apples that were in cold storage went?

A. Some of them went to the Coop Cannery.

Q. Do you know why?

A. Because they was spoiling.

Q. In cold storage, too?

A. Yes, A bruised apple in cold storage don't hold up. [2015]

* * * * *

Q. (By Mr. Karasick): Apples can be sent to the drier as well as to another cannery or to be canned; isn't that right? You can dry apples?

A. Yes.

Q. Now, does the quality of the apple to be dried have to be as good as the quality for fresh fruit?

A. No.

Q. Nor does it have to be good as canning quality, does it? A. No.

Q. Now, do you know what the quantities were of apples that were sent to the drier last year by Sagu? A. The quality?

Q. The quantity? A. No.

Q. Do you know how it compared with the quantity shipped in prior years? A. No.

Q. But that could have been done with an ex-

(Testimony of Ezra Briggs.)

cess of these culls, a number of them could have been sent to the driers; right? A. No.

Mr. Karasick: Your counsel is satisfied with the answer and is not moving to strike.

Q. (By Mr. Karasick): You say "No" they couldn't have been [2016] shipped to the driers?

A. That is right.

Q. Will you explain why?

A. Because the driers was full already.

Q. What driers, Green Valley, you are talking about? A. The driers in the Sebastopol area.

Q. Now, how do you know that?

A. Because I personally looked. [2017]

* * * * *

WILLIAM H. McGUIRE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Will you state your full name, please?

The Witness: William Henry McGuire.

Trial Examiner: And your home address?

The Witness: 900 Norlee Street, Sebastopol, California.

Direct Examination

Q. (By Mr. Berke): Mr. McGuire, what is your occupation?

A. Sales manager for the Sebastopol Apple Growers Union.

* * * * *

Q. (By Mr. Berke): How long have you been

(Testimony of William H. McGuire.)

sales manager for the Sebastopol Apple Growers Union? A. Approximately two years.

Q. Now, is Sebastopol Apple Growers Union also referred to at times as "Sagu" or "Molino"?

A. That is correct, sir.

Q. Did you have any other capacity with the Sebastopol Apple Growers Union prior to the two years that you have been sales manager?

A. Yes, sir. When I was first employed in 1952, I took over [2026] the job of stock record and control clerk.

Q. And how long were you, did you have that job? A. Just about a year.

Q. And when did you then—what was the next job you had after that at Sagu?

A. Next job I had was sales manager.

Q. And you have had that job continuously?

A. That is right, sir.

Q. Now, do you have any duties at all in connection with the board of directors at Sagu?

A. Yes, sir. I act as recording secretary for the board meetings.

Q. And what are your duties as recording secretary at the board meetings?

A. Well, I take all the important notes and discussions that take place at the board meetings, anything that might be of importance at a later date to our operation, and any motions that have been put before the board and passed, and so forth.

Q. Now, do you take such minutes at both regular and special meetings of the board?

(Testimony of William H. McGuire.)

A. Yes, sir, I do.

Q. Do you recall the meeting held on or about October 12, 1954, the board of directors at Sagu?

A. Yes, sir.

Q. Were you at that meeting? [2027]

A. Yes, sir, I was.

Q. Did you take minutes? A. Yes, sir.

Q. How did you take those minutes, Mr. McGuire?

A. Well, I have a pad that I make notes of the minutes on. It is a pad similar to what you have on your desk there.

Q. You are referring to what it called a legal tablet that I have in my hand, on yellow sheets?

A. Yes, sir.

Q. All right.

A. (Continuing) And I take the notes in either pen or with pencil and take the notes of all important discussions or matters that come before the board as a matter of permanent record in our minutes.

Q. And what do you do with those notes that you take, minutes?

A. Immediately following the board meeting after it has been adjourned, they are put in the safe and locked up for the night. And the following morning I take my notes and type them up.

Q. Do you personally type them up?

A. Yes, sir, I do.

Q. And what do you type them up on, Mr. McGuire?

(Testimony of William H. McGuire.)

A. On regular 8½ x 11 typewriter paper. We have a bond that we get from our local supplier.

Q. And what happens to the handwritten notes then?

A. The handwritten notes are kept until the minutes have been [2028] approved at the next regular meeting of the board of directors.

Q. Do you just type one copy of your handwritten notes, or what is the situation?

A. The day following the board meeting, I make one copy. Then, about three days prior to the next regular meeting, I make nine copies and send one copy to each board member that, we have nine members on our board, and they are mailed to them so when the next regular meeting comes up, rather than going to all the time to read each minute at that meeting, we mail it to them and then they can either correct or approve the minutes as they see fit.

Q. Now, the description you have given here of how you take minutes, how you type them up and what you do with them, was that done in connection with the meeting of October 12?

A. Yes, sir, it was.

Q. 1954? A. That is right, sir.

Q. Now, was this meeting that was held on October 12 a regular or special meeting, Mr. McGuire?

A. That was the regular monthly meeting.

Q. Now, when, in 1954, were regular monthly meetings held?

A. Normally on the second Wednesday of the month.

(Testimony of William H. McGuire.)

Q. Now, October 12, according to the calendar, was a Tuesday. Was there some particular reason, to your knowledge, why that meeting was held on Tuesday, the 12th, rather than Wednesday, [2029] the 13th? A. Yes, sir, there was.

Q. Will you please state it?

A. The board was called at the regular meeting on Tuesday due to the fact that Mr. Oskar Hallberg, who was president of the Apple Growers Council of California, was flying east the next day and there was information as to whether we wished to remain as a member of that organization or not and he had to have that information before he left Sebastopol for the East. Therefore, the meeting was called one day in advance.

Q. Now, I am handing you a book which you gave me a little while ago, Mr. McGuire; what is that book?

A. That is our minutes book of the Sebastopol Apple Growers Union.

Q. And does that contain, among other minutes, the minutes of the meeting of October 12, 1954?

A. One moment, and I will look.

Yes, sir, these are the minutes of October 12.

(Book handed to counsel for General Counsel.) [2030]

* * * * *

Q. (By Mr. Berke): Mr. McGuire, what happens to the original notes that you take at the meeting?

A. After the board has approved the minutes, I

(Testimony of William H. McGuire.)

take and destroy the original of my own, taken in my own handwriting. After they are typed in the book, then I see——

Q. Is that done at all regular and special meetings? A. That is right, sir.

Q. Was that done with respect to the meeting of October 12? A. That is right, sir.

Q. Now, is there a minute in this minute book that shows the minutes of October 12 were approved by the board? A. Yes, sir.

Q. And you are pointing to page what, 344 of the minute book?

A. Page 344 of the minute book, the regular meeting, dated November 17, 1954.

Q. You referred then to page 344 of the minute book relating to a regular meeting of the board of directors November 17, 1954, Sebastopol Apple Growers Union; is that correct?

A. That is right, sir. [2031]

Q. And, among other things, the minute states: "Minutes of the regular meeting of October 12 and special meeting of October 29 were approved as mailed." Is that correct?

A. That is right, sir.

Q. Now, did you type up, for the purpose of this hearing at my request, copies of the minutes of the regular meeting of the board of directors of October 12, 1954? A. Yes, sir, I did.

Q. And did you compare the copies that you typed with the minute as it appears here at pages 342 and 343 of the minute book?

(Testimony of William H. McGuire.)

A. Yes, sir, I did.

Q. And are they an exact and accurate copy of the minutes on pages 343 and 344 as they pertain to the regular meeting of the board of directors of October 12, 1954?

A. They do. Yes, sir.

Mr. Berke: I will offer the original minute as our exhibit next in order and ask leave to withdraw it and substitute these copies, since these are part of the company records.

Trial Examiner: Any objection?

Mr. Karasick: No objection.

Trial Examiner: That is No. 12. Respondent's No. 12 is received in evidence. And, there being no objection, permission is granted to withdraw the original and substitute copies.

Mr. Berke: Thanks. [2032]

(Thereupon the document above referred to was marked Respondent's Exhibit No. 12 for identification and was received in evidence.)

Q. (By Mr. Berke): Now, Mr. McGuire, following the meeting of the board of directors on October 12, 1954, did you have a discussion with Elmo Martini concerning what transpired at the board meeting?

A. Yes, sir, I did.

Q. When did you have that discussion?

A. The following morning about between 8:00 and 8:15 in the morning.

Q. That would be October 13, 1954?

A. That is right.

Q. And where did the discussion take place?

A. This discussion took place in Mr. Martini's

(Testimony of William H. McGuire.)

office at the Sebastopol Apple Growers Union.

Q. And who was present?

A. Mr. Martini and myself.

Q. And will you please tell us what was said and identify who was speaking?

A. Mr. Martini called me in his office and we went over the board discussion on the previous night as of October 12, and after looking into our warehouse problems and our production, it was decided——

Q. Well, will you, as near as you can, use the language that [2033] was used, what Mr. Martini said to you, what you said to him, as near as you can recall the substance of what was said?

A. Yes, sir. When Elmo called me in his office——

Q. What time was this?

A. I would say 8:15 the following morning of October 13.

Q. All right.

A. (Continuing) Mr. Martini called me in his office and said he would like to discuss the situation with me. So, we sat down and talked and he asked me about the, what I had on order, that is, our liquid sugar, our cans, our cartons, which were coming to the cannery.

Q. What did you tell him?

A. So I told him that, the amounts that I had ordered, and he wanted to know if we could take and have them stopped so we wouldn't have an excess on hand when we went to our single shift.

(Testimony of William H. McGuire.)

I told him "Yes," I would immediately contact the can companies and the sugar company and the carton people. We do have a problem of about a three-day transit time between our suppliers and ourselves. So therefore it is quite important that we schedule our supplies in to meet our production in our cannery.

Q. Go ahead with your conversation with Mr. Martini.

A. After that was discussed, Elmo told me to advise Mr. Duckworth that effective Monday morning to prepare a list of [2034] people who would remain on the single shift.

Q. Now, who was Mr. Duckworth at the time?

A. Mr. Duckworth—I am sorry, I didn't—

Q. Who was Mr. Duckworth at that time; what was his relationship to Sagu?

A. Mr. Duckworth was the cannery superintendent at that time.

Q. Now, have you told us all the conversation that you recall between yourself and Mr. Martini on that occasion?

A. As far as I can recall, yes.

Q. Now, following that conversation, what did you do?

A. I went to the cannery and got a hold of Mr. Duckworth and told him of Mr. Martini's conversation between Mr. Martini and myself.

Q. What did you say; use as near as you can recall the language used.

A. "Leonard, Elmo has asked me to relay the

(Testimony of William H. McGuire.)

message to you to cut our operation down to a one shift basis effective Monday morning, which would be October the 18th."

Leonard replied: "Well, that is fine, Bill; I will get on that right away."

And that was the conversation between Mr. Duckworth and myself.

Q. All right. Now, did you see Mr. Duckworth later that day or the next day about the matter of going from two shifts to one shift? [2035]

A. I saw Leonard later that afternoon. I asked Leonard if it would be of any help to him——

Q. Wait a minute. Where did you see him?

A. I saw him in the cannery office.

Q. All right. And who was present?

A. Mr. Duckworth and myself.

Q. All right. Go ahead.

A. I asked Mr. Duckworth if it would be of any assistance to him if I made a list of the employees who were then presently employed on day shift and night shift. We had records in our office.

And he said: "Yes, Bill, that would be fine, because it would be much easier if he had a good legible copy to read from."

So I said: "Well, that is fine, Leonard. I will make a copy for you and I will have it back in the office whenever you want it."

He said: "Okay, that is fine. You bring it in this afternoon and we will go over that list."

Q. Did you make up such a list?

(Testimony of William H. McGuire.)

A. Yes, sir. I made up a list of the day crew and a list of the night crew.

Q. Who were then presently at that time employed at Sagu? A. That is right, sir.

Q. And what did you do, was it all one list, or was it two [2036] lists, or what was the situation?

A. No, sir, it was two lists. I made one list which comprised the names of those on the day shift then presently employed, and one list of the night crew then presently employed.

Q. And what did you do with those two lists?

A. I took the lists over that afternoon to Mr. Duckworth in the cannery and told him these were the lists that I had made out so they could pick out their single shift.

Q. And was anyone present other than Mr. Duckworth when you handed him those lists?

A. Leonard was there. There were possibly one or two others; who it was, I do not know.

Q. Now, did that list or those lists subsequently come back to you?

A. Yes, sir; they came back to me Thursday morning, which was October the 14th.

Q. And when they came back to you, was there any change on them from the——

A. Was there any change made on them?

Q. ——from the manner in which you turned them over to Mr. Duckworth?

Mr. Magor: Object to on the ground it is not the best evidence.

(Testimony of William H. McGuire.)

Mr. Karasick: May the direct question be asked of the witness also? [2037]

Trial Examiner: I will permit that question. You may answer.

A. The changes made on the lists——

Trial Examiner: Don't tell what the changes were; just "Yes" or "No".

A. (Continuing) Oh, "Yes", I am sorry.

Q. (By Mr. Berke): Now, do you still have those lists? A. No, sir, I have not.

Q. Have you looked for them at my request?

A. I have looked high and low for them.

Q. All right. Now, will you tell us as you recall what the changes were on the lists?

A. Yes, sir. There was a penciled check mark by those names that they wished to retain on the single shift.

Q. Now, who brought those lists back to you, Mr. McGuire, as you recall?

A. Mrs. Ella Herrerias, who was then our floor lady.

Q. Mr. McGuire, did you participate in the selection of the people who were going to be retained for the single shift? A. No, sir.

Q. Did you participate in the meetings that were held for that purpose? A. No, sir. [2038]

* * * * *

Q. (By Mr. Berke): Now, do you recall a meeting that was held at Sagu of the employees on or about October 15? A. Yes, sir.

Q. Where did that meeting take place?

(Testimony of William H. McGuire.)

A. There was a meeting of employees in the warehouse directly east of our cannery building.

Q. Is that a separate building, separate from the cannery?
A. Yes, it is.

Q. And what time on that day did that meeting take place, Mr. McGuire, if you recall?

A. Between 3:30 and 4:00 o'clock.

Q. Were you informed before that meeting that such a meeting was going to be held?

A. Yes, sir; I was informed that morning.

Q. Which morning is that?

A. The morning of the 15th.

Q. By whom?

A. By Mr. Elmo Martini, our general manager.

* * * * *

Q. And will you tell us what was said and identify who is speaking, please?

A. Mr. Martini called me into his office and said they were going to have a meeting of the cannery personnel, that is, of both day and night shifts at—the time slips my mind—either 3:30 or 4:00 o'clock, at which time the names would be read for those who were going to remain on the single shift, and asked me if I would be ready at that time and to read the names off. And I told him that I would be ready.

Q. Now, did you attend that meeting that afternoon?

A. Yes, sir. I attended the meeting. I was in and out.

Q. By the way, was there any further conversa-

(Testimony of William H. McGuire.)

tion between Mr. Martini and yourself on that occasion? A. No, sir.

Q. You say you were in and out. What do you mean by that?

A. When the, at the time the meeting took up, I believe Mr. Bondi spoke first, and I mean I wasn't present all the time. I was, might have been there two or three minutes, and I'd have to go out maybe to answer the phone, or something like that.

Q. And did you actively participate in that meeting? A. Yes, sir.

Mr. Karasick: Object to the characterization, particularly [2043] in view of the witness' last answer, and ask it be stricken.

Trial Examiner: Motion denied.

Q. (By Mr. Berke): To what extent did you participate, Mr. McGuire?

A. I read the names off of the list which I had prepared from the two lists furnished me by Mrs. Herrerias as those names appearing to be retained on the single shift.

Q. Mr. McGuire, I show you a document that has been marked for identification as Respondent's Exhibit 13 and ask you if you have seen that before? A. Yes, sir.

Q. Was that prepared by you?

A. That is right. This is the list prepared by myself.

Q. Did you type it?

A. I typed this myself, yes.

Q. And the handwriting that appears thereon in

(Testimony of William H. McGuire.)

ink and the penciled scratch marks, whose are those?

A. Those are mine.

Q. When was that document prepared by you?

A. This was prepared by me on the afternoon of the 14th.

Q. Of what? A. 14th of August, 1954.

Q. August? A. October—I am sorry.

Q. And what was it prepared from? [2044]

A. This was prepared from the two lists that I had given the cannery superintendent, Mr. Duckworth, to work with to get the—to choose the ones, the single shift from the two shifts is what I am trying to say.

Mr. Karasick: Could I have that answer, please?

(Answer read.)

Q. (By Mr. Berke): Are those the two lists that you testified to this forenoon that Mrs. Herrierias brought back to you with check marks after the names? A. That is right.

Q. And it was from those two lists that you prepared this, Respondent's 13 for identification?

A. That is right.

Q. Now, you say at the meeting on the afternoon of October 15 you read the list of names. Tell us whether or not that list of names, Respondent's 13 for identification, was the list that you read?

A. This is the list that I read at that meeting, yes, sir.

Mr. Berke: I offer in evidence—there is a circle at the top in pencil with a 5, which was put there by me for the purpose of having five copies made.

(Testimony of William H. McGuire.)

I can't find the copies, but I will supply the duplicate and copies for the counsel for General Counsel.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 13 for identification.) [2045]

* * * * *

Voir Dire Examination

Q. (By Mr. Karasick): Mr. McGuire, do you remember the request to supply me a list, during the investigatory stages of this case, with the employees whose names you read were going to be retained—

A. I do. Pardon.

Q. —whose names were going to be retained at the layoff on October 14?

A. Oh, yes.

Q. General Counsel's Exhibit 36 has been stipulated, I think, between counsel as being the list that you sent to us at our request. You recall that, do you not?

A. I recall when you asked me for the list, yes, sir.

Q. You remember that this list was sent to us at our request, namely General Counsel's Exhibit 36, which you hold in your hand?

Mr. Berke: Well, just a minute. I am going to object to this. Improper voir dire. He is not questioning about the document I have offered.

Mr. Karasick: This is preliminary.

Mr. Berke: Well, wait a minute. This line of questioning is more appropriate for cross examination.

(Testimony of William H. McGuire.)

Trial Examiner: It sounds to me like it is. I don't know—— [2046]

Mr. Karasick: It is preliminary to this list.

Trial Examiner: I will permit it. Go ahead.

Mr. Karasick: Would you—I don't expect you remember the last question, do you, Mr. McGuire?

The Witness: No, sir, I don't.

Mr. Karasick: I will ask the reporter to read it for you.

(Question read.)

Mr. Karasick: That is right, isn't it?

A. That is right.

Q. (By Mr. Karasick): And the list was prepared by you and then sent on to us?

A. This list that I hold in my hand here, after Mr. Berke brought it to my attention——

Q. Just answer my question.

A. I am trying to.

Q. My question is, the list you hold in your hand was prepared by you and sent to the board?

A. This was not prepared by me, no, sir. That is what I am trying——

Q. Will you tell us who prepared it?

A. Miss Ernestine Albini prepared this.

Trial Examiner: Has the exhibit number been given?

Mr. Karasick: Yes, General Counsel's Exhibit 36 we are talking about, is it? [2047]

The Witness: That is right.

Q. (By Mr. Karasick): Miss Ernestine Albini

(Testimony of William H. McGuire.)

at that time was an office employee of the respondent, was she not?

A. That is right; she was.

Q. Working in the office with you?

A. She was under the direct supervision of Mr. Wilson, not myself.

Q. Yes. But she was in the office with you?

A. That is right.

Q. And did you ask her to prepare this list?

A. Yes, sir. I asked her to prepare this list. I got the list out of our files after I had been requested by yourself to make this list, and asked her if she would make a copy so I could have it sent in for your files.

Q. And then you gave her for the purpose of preparing the copy the copy, which copy is now marked as Respondent's Exhibit 13 for identification; is that right?

A. That is correct, sir. [2048]

* * * * *

Trial Examiner: There has been testimony in this case, Mr. McGuire, that Erma Bate's name was not read at the meeting at which you read the list of names and that she was later told that that, it was a mistake that her name was left off. Now, the [2055] question is, in the light of such testimony, would it refresh your recollection now as to whether or not her name was on the list that you prepared and that you have identified now as——

Mr. Berke: That is you mean was it on there at the time he read it?

(Testimony of William H. McGuire.)

Trial Examiner: Was it on there at the time you prepared it, or was it added later?

The Witness: No, sir; it was on the original list that I prepared. It appears on this list here, Mr. Hearing Officer.

Mr. Berke: Referring to what, Respondent's 13 for identification?

The Witness: That is correct. [2056]

* * * * *

Q. (By Mr. Karasick): How many copies of Respondent's Exhibit 13 for identification did you make up, Mr. McGuire?

A. I made up one, Mr. Karasick.

Q. Just this copy?

A. That is right, sir.

Q. And no other copies? A. No.

Q. Where has it been since that time; what did you do with it immediately after you read it?

A. It has been in our file in the office. [2057]

* * * * *

Trial Examiner: All right. Respondent's Exhibit 13 is received in evidence, subject to production of a duplicate.

* * * * *

Direct Examination—(Resumed)

Q. (By Mr. Berke): Now, Mr. McGuire, during the times that you were present at the meeting of the employees in the warehouse on October 15, did you hear Mr. Bondi speak?

A. No, sir, I did not.

Q. All right. You have answered it.

(Testimony of William H. McGuire.)

Did you hear Mr. Martini speak at that meeting?

A. Just part of his speech is all.

* * * * *

Q. (By Mr. Berke): Did you observe during the time you did hear Mr. Martini speak whether or not he was speaking from any notes or any documents?

A. Mr. Martini had a paper in his hand.

Q. Do you know what that paper was?

A. If I could see it I could identify it.

Q. I show you a document in evidence, Mr. McGuire, as General Counsel's Exhibit 25, which is dated October 14, 1954, mimeographed on the letterhead of Sebastopol Apple Growers Union and ask you, looking at that, if that refreshes your recollection as to the document from which Mr. Martini read while you were present on October 15?

A. Yes, sir, it does.

Q. Now, do you know whether or not copies of that document [2062] were made up?

A. Yes, sir, there were.

Q. And what was done, if you know, with those copies?

A. Immediately after the meeting was over, the employees who had been terminated were each given a copy so that they may present this to the Unemployment Office, showing they had been terminated through no fault of their own.

Q. Mr. McGuire, did you know an employee by the name of Clarence Storey during the 1954 season?

A. Clarence Storey?

(Testimony of William H. McGuire.)

Q. Yes. A. Yes, sir, I did.

Q. Now, Mr. Storey testified here that sometime in the spring of 1954 you met him in town and asked him if he was going to return to work this season. And when he answered that he was you said "Good."

Did such a conversation take place?

A. No, sir, it did not.

* * * * *

Q. (By Mr. Berke): Now, Mr. McGuire, Mr. Storey also testified [2063] that about four days before July 12 in the afternoon you telephoned him and stated that SAGU was going to run a trial batch on July 12 and asked him "Will you be here with us?"

Did such a call take place?

A. No, sir, I made no such call.

Q. Did you ever make a telephone call to Mr. Storey to ask him to come to work?

A. I did not.

Q. Did you ever call any employee to ask any employee in the cannery to come to work?

Mr. Karasick: I object on the grounds that it is not material, relevant, or competent.

Trial Examiner: Overruled. You may answer.

Mr. Berke: Would you give him the question?

(Question read.)

A. No, sir.

Q. (By Mr. Berke): Mr. McGuire, did you know an employee during the 1954 season at SAGU by the name of Tripp? A. Yes, I recall.

(Testimony of William H. McGuire.)

Q. Now, Mrs. Tripp testified here that on October the 14th while she was working in the can car, you stopped and asked the girls in the can car where their buttons were. Did such an occurrence take place on October 14 or any time during the season of 1954?

A. It most certainly did not, no, sir. [2064]

Q. She also testified that you were asked where your button was and that you lifted up your sport shirt and revealed a union button between your hip and side pocket. Did such an occurrence take place on October 14 or any time during the season of 1954?

A. No, sir, it did not.

Q. Did you at any time during the season of 1954 wear a union button?

A. No, sir, I did not.

Q. Did you at any time during the season of 1954 wear a button, whether it was a union button or any other kind of a button between your hip and side pocket?

A. No, sir, I never did.

Q. Did you during the 1954 season wear a button, whether it be a union button or some other button, did you wear a button?

A. Yes, sir, I did.

Q. Now, what sort of a button was that?

A. Well, it was the button put out by Mr. Eisenhower, "I Like Ike."

Q. Where did you wear that?

A. Wore it up here (indicating).

Q. Where are you indicating with your finger?

A. Well, just above my heart.

(Testimony of William H. McGuire.)

Trial Examiner: On your shirt?

Q. (By Mr. Berke): On your shirt? [2065]

A. Yes. On my shirt, just above the pocket.

Q. Do you still have that button?

A. No, sir, I have not.

Q. Can you describe for us what it looked like?

A. The best of my ability, a round button about the size of maybe a quarter, American quarter, white, and in, I believe, dark blue lettering or possibly black it had "I Like Ike" across, around the, it had a little blue and red shield with the American flag. [2066]

* * * * *

A. The election was after the layoff.

Q. Now, Miss Albini testified that after the election you said you had a list which you were going to send to the Cooperative. Did you make such a statement?

A. No, sir, I did not.

Q. Did you have such a list that you were going to send to the Cooperative?

A. Absolutely not, no, sir.

Q. Did you send a list to the Cooperative?

A. No, sir, I did not.

Mr. Berke: You may cross examine.

Cross Examination [2069]

* * * * *

Q. (By Mr. Karasick): The differences between General Counsel's 36 and Respondent's 13 are 38 in number, from my quick count, and that 38 counts names that, if you take General Counsel's 36 as a

(Testimony of William H. McGuire.)

basis, were either deleted from that exhibit or added to it, in other words, changes on the list.

Now, with that in mind, Mr. McGuire, can you explain to the Examiner how that many changes could occur in a document or did occur in this document which marks the difference between Respondent's 13 and General Counsel's 36?

A. The only logical answer that I can give, Mr. Karasick, is, as I stated before, I had Miss Albini type the list up at your request and in our files we have numerous lists and whether by mistake that she typed several names that had off her flyleaf that might have come back this way, I don't know. She may have [2086] done that.

And, unfortunately, I did not check these lists after Miss Albini typed it because she was an excellent typist and therefore I did not take and recheck the list from the one that we had in our file. That is the only possible reason that I can give.

Q. She gave the list to you after she typed it for submission to us or forwarding to us; is that right?

A. That is right.

Trial Examiner: Mr. Karasick, have you asked him how many copies of the list Ernestine Albini made?

Mr. Karasick: No. But I would be very happy to.

Q. (By Mr. Karasick): How many copies of the list did Miss Albini—

A. She made just one list here, as I recall?

Q. Just the original?

(Testimony of William H. McGuire.)

A. Yes. I asked her if she would make a list of these names so I could send them in to Mr. Karasick of the National Labor Relations Board. He had requested this list. And if she would make them up for me. She said she would.

Trial Examiner: What was the date you asked her to do it?

The Witness: Sometime right around the middle part of February.

Mr. Berke: What year?

The Witness: 1955. [2087]

* * * * *

Q. Did I understand that you wore an "I Like Ike" button in 1954? A. Yes, sir.

Q. When did you stop wearing it? I am merely curious whether the campaign was beginning early or——

Mr. Berke: What has that to do with the case?

Trial Examiner: It has a bearing on the case.

A. I would say I wore it a couple of days, Mr. Karasick.

Q. (By Mr. Karasick): When was the time that you did wear it, according to your recollection?

A. Well, it was in October.

Q. In October. And in relation to the layoff of October 15, 1954, was it before or after?

A. It was before that time.

Q. How long before?

A. Oh, as far as my memory serves me, possibly the first week of October.

Q. You wore the button a couple of days; is that

(Testimony of William H. McGuire.)

right? A. That is right.

Q. What prompted you to wear it at that time?

A. I hate to take up the space of the reporter and so forth——

Mr. Berke: Go ahead and answer the question. Don't worry about space. [2089]

A. (Continuing): I will answer the question then.

We had a young chap that worked at the plant and it wasn't his fault that he was a little mentally deficient, poor fellow. But anyway, he was a very strong Eisenhower backer, and myself, I was on the other side. And we kept joking back and forth, oh, for maybe a month or so about the pros and cons of each party. And he had, I would say, nine or ten of these buttons he used to wear on his cap and on his shirt and even on the back of his jacket. [2090]

* * * * *

Q. (By Mr. Karasick): You knew that an election was imminent at the time the board of directors held their meeting on October 12, did you not?

A. We had had notice that there was going to be one. We had no definite date, Mr. Karasick.

Q. The Board direction of election had come out before that, had it not? A. That is right.

Q. Nothing was said at the meeting on October 12 at the board of directors meeting about the election at all. Was that right?

A. There was nothing mentioned at the meeting, no, sir. [2091]

* * * * *

(Testimony of William H. McGuire.)

Q. No discussion of organizing the employees?

A. No, sir.

Q. No discussion of employees being members of the union or not being members of the union?

A. No, sir.

Q. No discussion of the fact that the number of employees who were union adherents or weren't union adherents would or wouldn't affect the election one way or another, was there?

A. No, sir.

Q. No question raised as to this entire problem as it would affect operations of the plant, was there?

A. No, sir. [2092]

* * * * *

Q. (By Mr. Karasick): Did you take the minutes of the board of directors meetings last year?

A. I acted merely as recording secretary.

Q. And as such you attended all meetings of the board of [2093] directors last year, both general and special?

A. I attended most of them, and in my absence Mr. Wilson would take the minutes. Sometimes I would be ill or previous commitments and I wouldn't be there and so Mr. Wilson would.

Q. Those were rather infrequent intervals; for the most part, you were able to record the minutes and be there, weren't you?

A. Yes, sir.

Q. Now, with that as a background, you don't recall any discussion of this subject matter I just called to your attention at any of those meetings; is that right?

A. About an impending election?

(Testimony of William H. McGuire.)

Q. About an impending election, about organization of employees, upon the union drive, or anything of a similar nature?

A. There was a meeting earlier that the manager brought out that he had been contacted by the local representatives of the labor union and that they wished to see if they could organize the people in our cannery. I think that was in the, possibly the latter part of July that that took place.

Q. The book of the minutes of last year are here, are they not? A. They are, sir.

Q. Would you check the minutes for that period and see if you can find those minutes?

Mr. Berke: Well, go ahead, but I am going to object to this line as going beyond the scope of the direct and improper [2094] cross examination.

Trial Examiner: Overruled.

A. (Examining book): There was a special meeting on July 28 of 1954.

Q. (By Mr. Karasick): Where that subject matter was brought up?

A. That is the subject matter was that Mr. Rhodes and Mr. Bertolucci had visited Mr. Martini's office and had discussed the possibility of organizing the cannery help.

Q. What else was mentioned in the minutes about that?

A. That considerable discussion was held in this regard. Briggs suggested that the manager contact Mr. Jack Rossi, R-o-s-s-i, who was an expert on matters of this type to find out what favorable

(Testimony of William H. McGuire.)

action we could take to discourage the AFL from causing any disturbances among our employees.

Q. Anything further in the minutes in regard to that matter?

A. No. The next paragraph has to do with the——

Mr. Berke: You don't have to state. If there is nothing further, I am going to object to it.

The Witness: No. Just that one.

Mr. Karasick: I take it you have no objection if I look at this?

Mr. Berke: That particular minute, yes.

Q. (By Mr. Karasick): (Examining book) Do you recall was this a minute that you took notes of, Mr. McGuire? [2095]

A. Yes, sir.

Q. Who was the Jack Rossi that was referred to in the minutes, do you know?

A. No, sir, I don't.

Q. Who mentioned him as——

A. I believe it states that Mr. Briggs—yes.

Q. Mr. Briggs mentioned him. And what did Mr. Briggs say about him, where he was or who he was?

A. No, sir. The only thing that was stated he contact Mr. Jack Rossi.

Q. I direct your attention, Mr. McGuire, to the sentence in the minutes: "Considerable discussion was held in this regard" which follows your statement that the manager reported Mr. Rhodes and Mr. Bertolucci had visited him.

(Testimony of William H. McGuire.)

Will you tell us, to the best of your recollection, what that discussion was?

A. Well, that, the board members merely asked the manager what the discussion was between Mr. Rhodes and Mr. Bertolucci and Mr. Martini and he answered them that they had contacted him, they came into the office and had discussed the possibility of organizing the help.

Q. Told him they were interested in organizing the employees?

Mr. Berke: Well, would he be permitted to tell—

Trial Examiner: Do you want him to finish first?

Mr. Karasick: I am interrupting him at this point, if he [2096] doesn't mind.

Q. (By Mr. Karasick): In effect, what he had said was—Mr. Martini said they had told him they were interested in organizing the employees of the cannery. Is that right? A. That is right.

Q. Then what was the discussion that followed that?

A. Well, I believe that was all the discussion, Mr. Karasick. The board members just asked Mr. Martini to advise them what had taken place at the meeting. And Mr. Martini related that they had paid him a visit and was interested in seeing if they could organize the cannery help.

Q. And did the various members of the board of directors then express themselves either for or against this idea?

A. No. They—all they wanted to find out is what

(Testimony of William H. McGuire.)

was said between Mr. Rhodes and Mr. Bertolucci and the manager; in other words, what was taking place, or what had taken place, excuse me.

And the manager advised then that they had come into his office and, as I said before, said they were interested in organizing the cannery help.

Q. But nobody at that meeting expressed himself either as in favor of or against the general proposition of a union organizing the employees of the cannery. Is that right?

A. No, sir, they did not.

Q. I see. Now, is this—I notice you used the words here [2097] “considerable discussion was held in this regard.”

Is what you have told us all the discussion that was——

A. As far as my memory serves me, that is right. It isn't as though it went on for half an hour, 45 minutes or an hour. Maybe five or ten minutes. But I mean they discussed that one thing, what did they say, when were they here, how long did they stay. I mean it is things the board should be advised on by the manager on what is happening from time to time in the plant regardless whether it is this, the movement of apples, the price of apple sauce, why, they always, he is the one responsible for advising them and keeping them advised of all matters.

* * * * *

Redirect Examination

Q. (By Mr. Berke): Mr. McGuire, the two lists that Mrs. Herrerias gave you, so it is clear in

(Testimony of William H. McGuire.)

the record, were those [2098] the two lists that you had typed up of the day shift and the night shift that you had given to Mr. Duckworth?

A. They are the two lists.

Q. Now, you were asked by Mr. Karasick, and he read from an affidavit that you made, and you indicated you wanted to explain something about that. May I have it, Dave, just a moment?

Mr. Karasick: Surely.

Q. (Continuing): On page 3 where reference is made to your having typed up two copies of this list for our records you indicated or I gathered you indicated you wanted to explain that. Is there something you want to say in that regard?

A. After reading this over, I am sure what I had reference to I typed up two copies of this list for our records that, the two copies of the day and night shift that I had given Leonard Duckworth to use in their choosing the single shift from those two lists. I think that this is worded very vaguely, here.

Q. Is that your explanation as to the two copies of this list that is referred to in there?

A. The two copies of the list that I made up for Leonard Duckworth, yes.

Q. Is that what you had reference to?

A. I am positive that is what I had reference to, and not two lists of this one here. [2099]

Q. That is, not two lists of Respondent's Exhibit 13. Is that what you are pointing at?

A. That is right. [2100]

* * * * *





